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RECORD, CASE No. 13,742.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 157.

WILLIAM F. PATRICK, APPELLANT,

vs.

FRANK J. BOWMAN, TO THE USE OF DENNIS P. SLATTERY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 12, 1889.

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1 *Transcript Filed.*

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the Circuit Court of the United States in and for the Eastern Division of said Judicial District.

Be it remembered that on the nineteenth day of October, A. D. 1886, the following, among other, proceedings were had and appear of record in the circuit court of the United States for the eastern district of Missouri, to wit:

FRANK J. BOWMAN, Complainant,
vs.
WILLIAM F. PATRICK *et al.*, Defendants. } 2732.

Now come defendants, by E. Cunningham, Jr., their solicitor, and file transcript from St. Louis circuit court and enter their appearance.

Said transcript is in words and figures following, to wit:

(*Transcript.*)

STATE OF MISSOURI,
City of St. Louis, } *ss:*

Be it remembered that heretofore, to wit, on the 15th day of October, 1886, there was filed in the office of the clerk of the circuit court, city of St. Louis, a petition wherein Frank J. Bowman is plaintiff and Wm. F. Patrick *et al.* are defendant-; which petition is in words and figures as follows, to wit:

(*Petition.*)

In the Circuit Court of the City of St. Louis, Mo., December Term, 1886.

2 FRANK J. BOWMAN, Pl'ff,
vs.
WM. F. PATRICK & JAMES M. PATRICK, Defendants.

Plaintiff states that heretofore, to wit, on the 1st of January, 1882, he entered into an agreement with the defendant Wm. F. Patrick for the purchase of certain mining property situated near the town of Leadville, in the State of Colorado, known as the Col. Sellers and Accident mines; that pursuant to the said agreement the said Wm. F. Patrick and plaintiff purchased together a one-half interest in said mines upon the terms and conditions that such half interest should be conveyed to them in consideration of the moneys necessary for the developing of said mines, to be by them furnished, paid,

and advanced, a one half to each of them, and it was between the plaintiff and said Wm. F. Patrick agreed that said Patrick should, acting as well for himself as for the interest of the plaintiff, as his equal partner in said purchase, proceed to develop and open said mines; that all sums of money from time to time found necessary and required for such purpose were well and truly paid, a one-half by each, and said Wm. F. Patrick remained, as agreed, at said mines and superintend- the opening and developing of the same until about October 19th, 1882; that prior to the date last mentioned, to wit, about August 1st, 1882, the mines had been, at the equal expense as aforesaid of the said Bowman & Patrick, so developed as to reveal to the said Patrick, then superintending the opening of said mines and acting for plaintiff as aforesaid, a large body of valuable ore, and fully reveal and establish the value of said mines; but said Wm. F. Patrick, intending and contriving to defraud and cheat the said plaintiff, did fraudulently conceal the discovery of said ores & did falsely state and represent to said plaintiff that the work and labor done and moneys then expended had failed to discover
3 any mineral of value and did falsely represent that a large sum of money would be necessary to further prosecute the discovery of any valuable minerals in said mines when in truth and fact he then, as the partner and agent of the plaintiff, being thereunto especially entrusted and confided in, well knew that such representations and pretenses were false and the same were so made by him with intent to persuade, induce, and procure from — by means of the false pretenses as aforesaid the transfer of the said one fourth interest in said mines so held and owned by the plaintiff as aforesaid to him, the said Wm. F. Patrick, and his brother and co-defendant herein, James M. Patrick, in the fraudulent and deceitful scheme of procuring by the fraudulent means aforesaid the transfer to said Wm. F. Patrick the one-fourth interest of said plaintiff in and to said mining property, and by the deceit and fraudulent representations aforesaid did cause and procure from the plaintiff a transfer of his said interest on the 19th day of October, 1882, at St. Louis, Missouri, to said Wm. F. Patrick, by whom the same is now held and claimed, a two-thirds of said interest for himself and a one-third thereof for the defendant James M. Patrick; that the transfer so obtained by the deceit and fraudulent representations aforesaid was for a mere nominal consideration of six hundred dollars; that a knowledge of the fraud and deceit so practiced upon the plaintiff as aforesaid first came to the plaintiff's knowledge during the past three months; that at the time of said transfer the one-fourth interest so obtained from the plaintiff was worth $800,000.00, and this fact was well known to the defendant Wm. F. Patrick at the time of making, as the agent and partner of the plaintiff, the false and fraudulent representations to him as aforesaid and by means whereof the transfer as aforesaid was obtained.

That since the making of the said transfer the said defendants have enjoyed the profits upon the said interest so fraudu-
4 lently obtained by the means aforesaid, which have resulted from the working of said mines, amounting to upwards of

two hundred thousand dollars. Wherefore the plaintiff prays that the said transfer of his interest in the said property so fraudulently obtained as aforesaid may be annulled and set aside & for naught held, and that the defendants may be required to account for all moneys by them or either of them received as profits upon the interest of the plaintiff so fraudulently obtained, and for such other and further relief as to equity and good conscience may appertain.

R. S. MacDONALD &
SIM. T. PRICE,
Att'ys for Pl'ff.

Upon the filing of which petition a summons was issued same day, directed to the sheriff of the city of St. Louis; which summons, together with the sheriff's return thereon, is in words and figures as follows, to wit:

(*Summons.*)

STATE OF MISSOURI, } ss:
City of St. Louis, }

The State of Missouri to the sheriff of the city of St. Louis, Greeting:

We command you to summon Wm. F. Patrick and James M. Patrick to appear before the judges of our circuit court on the first day of the next term thereof, to be held in the city of St. Louis, at the court-house, in said city, on the first Monday of December next, then and there to answer the complaint of Frank J. Bowman, as set forth in the annexed petition, and have you then and there this writ.

5 Witness Charles F. Vogel, clerk of our said court, with the seal thereof hereto affixed, at office, in the city of St. Louis,
[SEAL.] this fifteenth day of October, in the year of our Lord eighteen hundred and eighty-six.

CHAS. F. VOGEL, *Clerk.*

(*Sheriff's Return.*)

Executed this writ in the city of St. Louis on the 15th day of October, 1886, by delivering a copy of the writ and petition as furnished by the clerk to William F. Patrick, one of the within-named defendants.

Further executed this writ in the city of St. Louis and on the same day by delivering a copy of the writ as furnished by the clerk to James M. Patrick, the other within defendant.

HENRY F. HARRINGTON, *Sheriff,*
By PETER J. NOLAN, *Deputy.*

Fee, $2.00.

And afterwards, at a special term of the circuit court, being the October term, 1886, the following proceeding was had in said cause, to wit:

(*Order of Removal.*)

SATURDAY, *October* 16*th*, 1886.

FRANK J. BOWMAN
vs.
WM. F. PATRICK and JAMES M. PATRICK.

On petition of defendants by attorney, this day filed, it is ordered by the court that, upon defendants' giving bond in the sum of $250.00, to be approved by the court, that the clerk of this court forthwith certify to the circuit court of the United States for the eastern district of Missouri a full, true, and complete copy of
6 the record and proceedings in this cause as fully as the same appear of record in his office. Bond approved and filed.

Which petition and bond for removal are respectively in words and figures as follows, to wit:

(*Petition for Removal.*)

STATE OF MISSOURI, *City of St. Louis,* } *ss:*

FRANK J. BOWMAN, Plaintiff,
vs.
WILLIAM F. PATRICK and JAMES M. PATRICK, Defendants.

Petition for Removal to the United States Circuit Court for the Eastern District of Missouri.

To the honorable the judges of said circuit court of the city of St. Louis:

Your petitioners, William F. Patrick and James M. Patrick, show to the court that the matter and amount in dispute in the above-entitled suit exceed, exclusive of costs, the sum of $500; that the controversy in said suit is between citizens of different States, and that your petitioner William F. Patrick was at the time of the commencement of this suit and still is a citizen of the State of Colorado, and that your petitioner James M. Patrick was at the time of the commencement of this suit and still is a citizen of the State of Colorado, and that said plaintiff, Frank J. Bowman, was then and still is a citizen of the State of Missouri, and your petitioners offer herewith bond with good and sufficient sureties for their entering in said circuit court of the United States for the eastern district of Missouri on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and your petitioners pray this
7 honorable court to proceed no further herein except to make the order of removal required by law and to accept the said sureties and bond and to cause the record herein to be removed into

said circuit court of the United States in and for the eastern district of Missouri; and your petitioners will ever pray.

EDW'D CUNNINGHAM, JR.,
For Defendants, Petitioners.
EDW. C. ELIOT,
For Def'ts, Petitioners.

STATE OF MISSOURI, } ss:
City of St. Louis, }

William F. Patrick, being duly sworn, on his oath says that he is one of the defendants, petitioners in this case; that he has read the foregoing petition and knows the contents thereof, and that the statements and allegations therein contained are true, as he verily believes.

JAMES M. PATRICK.

Subscribed and sworn to before me this 16 day of Oct., 1886.
CHAS. F. VOGEL, *Clerk.*

(*Bond for Removal.*)

Know all men by these presents that we, William F. Patrick and James M. Patrick, as principals, and Edward C. Eliot, as surety, are held and firmly bound unto Frank J. Bowman in the penal sum of two hundred and fifty dollars; for the payment whereof, well and truly to be made, unto the said Bowman, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Saint Louis, Missouri, this sixteenth day of October, 1886.

Upon this condition, however: Whereas the said William F. Patrick and James M. Patrick have petitioned the circuit court of the city of St. Louis, State of Missouri, for the removal of a
8 certain cause therein pending, wherein Frank J. Bowman is plaintiff and the said William F. Patrick and James M. Patrick are defendants, said cause being numbered 136, returnable to the December term, 1886, to the circuit court of the United States for the eastern district of Missouri:

Now, therefore, if the said William F. Patrick and James M. Patrick shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said suit was wrongfully or improperly removed thereto, then this obligation shall be void; else it shall remain in full force and virtue.

WILLIAM F. PATRICK. [SEAL.]
JAMES M. PATRICK. [SEAL.]
EDW. C. ELIOT. [SEAL.]

Approved by the court October 16, 1886.
CHAS. F. VOGEL, *Clerk.*

(*Clerk's Certificate.*)

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Charles F. Vogel, clerk of the circuit court, city of St. Louis, do hereby certify that the above and foregoing is a true, full, and complete transcript in a certain cause wherein Frank J. Bowman is plaintiff and William F. Patrick *et al.* are defendants, as fully as the same remain on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in the city of St. Louis, this 16th day of October, A. D. 1886.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

9 And afterwards, to wit, on the third day of January, A. D. 1887, there was filed in said cause a joint answer of defendants in words and figures following, to wit:

(*Joint Answer of Defendants.*)

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States within and for the Eastern District of Missouri.

FRANK J. BOWMAN, Plaintiff, }
vs. } Number 2732. In Equity.
WILLIAM F. PATRICK and JAMES M. PATRICK, Defendants. }

The answer of William F. Patrick and James M. Patrick to the bill of complaint of Frank J. Bowman.

These defendants, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be taken or had to the many errors, uncertainties, and other imperfections in the said plaintiff's bill of complaint contained, for answer thereto or unto so much or such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, these defendants, answering, say:

1. That they deny that at the time stated in said complaint or at any other time the plaintiff entered into an agreement with the defendant William F. Patrick for the purchase of certain mining property therein described, as alleged in said complaint; and deny that pursuant to said alleged agreement said William F. Patrick and plaintiff purchased together a one-half interest in said mines
10 upon the terms and conditions alleged in said complaint or upon any other terms or conditions except as hereinafter stated.

2. Defendants admit that it was between the plaintiff and said William F. Patrick agreed that said Patrick should, acting as well for himself as for the plaintiff's interest as his equal partner, proceed to develop and open said mines, but allege that said agreement was under and in pursuance of a contract which is hereinafter specifically set forth.

3. Defendants deny that all sums of money from time to time found necessary and required for such purposes were well or truly paid or paid at all, one-half by each, but aver that such payments were made in the manner and by the persons hereinafter stated.

4. Defendants deny that at the time stated in said complaint, to wit, about August 1st, A. D. 1882, said mines had been at the equal expense of said plaintiff and the defendant William F. Patrick or otherwise so developed as to reveal to said Patrick a large or any body of valuable ore or ore of any kind, or had been developed in any manner to fully or otherwise reveal or establish the value of the said mines.

5. Defendants deny that said William F. Patrick, intending or contriving to defraud or cheat the said plaintiff, did fraudulently or otherwise conceal the discovery of any ores, and deny that he did falsely state or represent to the plaintiff that the work or labor done or moneys then expended had failed to discover any mineral of value, and deny that he did falsely represent that a large sum of money or any sum would be needed to further prosecute the discovery of any valuable minerals in said mines.

6. Defendants deny that the said William F. Patrick at the time mentioned in said complaint, or at any other time, knew that said alleged representations and pretences were false, and deny that he made such or any representations or pretences as are charged in said complaint with intent to persuade or induce or procure from, by means of said alleged false pretences or otherwise, the transfer of one-fourth interest or of any interest whatever in said mines by the plaintiff to him, the said William F. Patrick, and his brother and codefendant herein, James M. Patrick.

7. Defendants deny that said William F. Patrick at the times in said complaint stated or at any other time, by the means alleged in said complaint or otherwise, was engaged in any fraudulent or deceitful scheme of procuring the transfer to him of the one-fourth or of any interest of said plaintiff in and to said mining property, or by any deceit or fraudulent representations of any character whatever did cause or procure from the plaintiff a transfer of any interest whatever in said mines, on the 19th day of October, A. D. 1882, or at any other time, at St. Louis, Missouri, or at any other place, to said William F. Patrick a two-thirds of said alleged interest for himself, the said William F. Patrick, and a one-third thereof for the defendant James M. Patrick.

8. Defendants deny that the transfer of any interest in said mining property from the plaintiff to the defendants or either of them was for a mere nominal consideration of six hundred dollars or for any other consideration except as hereinafter stated.

9. Defendants deny that any knowledge of any fraud or deceit

practiced upon the plaintiff by the defendants or either of them came to the plaintiff during the time stated in said complaint or at any other time, and deny that any fraud or deceit was practiced upon the plaintiff by the defendants, as alleged in said complaint or otherwise.

10. Defendants deny that at the time of the transfer by the plaintiff of his interest in said mining property to the defendants or either of them that the interest so transferred was worth the sum of eight hundred thousand dollars or any other sum exceeding the amount paid therefor by the defendant William F. Patrick to the plaintiff.

11. And defendants deny that at the time alleged in said complaint or at any other time or place the plaintiff transferred to the defendants or either of them a one-fourth interest in said mining property, as alleged in said complaint.

12. Defendants deny that since the making of said alleged transfer these defendants have enjoyed the profits upon the interests alleged by the plaintiff to have been fraudulently obtained by the defendants, amounting to the sum of two hundred thousand dollars or any other sum whatever.

The defendants, further answering said bill of complaint, allege:

13. That on the 17th day of February, A. D. 1882, Lyman Robinson, T. C. Stebbins, Samuel J. Glover, and Harvey Howard were the owners, subject to the paramount title of the United States, of that certain lode mining claim known as and called the Colonel Sellers lode, and said last above named parties, with the exception of said Harvey Howard, were the owners, subject to the paramount title of the United States, of that certain lode mining claim known as and called the "Accident" lode, both of said claims situate in California mining district, county of Lake and State of Colorado; that said mining claims were mere prospects and upon which no mineral in rock in place had been discovered or disclosed; that said above-named owners, being unable to develop said property, on the day and year last aforesaid entered into a certain written agreement with the defendant William F. Patrick and the plaintiff, Frank J. Bowman, by the terms of which said last-named parties were to sink a shaft on said premises to limestone in place or bed rock, unless pay mineral should be found in said shaft before reaching the limestone in place or bed rock, and were also to make application to the Government of the United States for patent deeds for said premises, and to pay all costs and expenses of every description incident to and growing out of said application until patents therefor had been obtained; that upon the full performance of said contract by the said Patrick and Bowman the said owners of said mining claims were to deliver a certain deed bearing even date with said contract to said Patrick and Bowman, conveying to them an undivided one-half of said Col. Sellers and Accident Lode mining claims; that a copy of said agreement is in the words and figures following, to wit:

This agreement made and entered into this 17th day of February, A. D. 1882, by and between Theodore C. Stebbins, Lyman Robison,

Samuel J. Glover and Harvey Howard, parties of the first part, and William F. Patrick of Leadville Colorado and Frank J. Bowman of St. Louis Missouri, parties of the second part, witnesseth:

That whereas the parties of the first part own certain mining claims, lodes, ledges, veins or deposits known and designated the Col. Sellers and Accident lodes, situated in the California mining district, Lake county Colorado, and particularly described in a certain deed of conveyance this day executed by the parties of the first part, conveying an undivided one-half of said property to the parties of the second part for the expressed consideration of five thousand dollars, and which said deed has this day been deposited in escrow with C. C. Parsons to be delivered to the parties of the
14 second part, when they shall have sunk a good and substantial shaft in and upon said premises to limestone in place or bed rock, unless pay mineral is found in said shaft before reaching the limestone in place or bed rock. Said shaft shall be not less than eight feet by four feet in the clear and shall be well timbered and constructed in a good workmanlike manner.

It is also agreed by the parties of the second part that the work of sinking said shaft shall be commenced within thirty days from this date and continued with no intermissions exceeding ten (10) days at any one time (unless the inclemency of the weather shall prevent) until pay mineral or limestone in place is reached.

The parties of the second part further agree to make applications for a patent title to said mining claims and to pay all the costs and expenses of every description incident to and growing out of said applications until patents therefor have been obtained. The work of procuring patents on said claims, shall be commenced within sixty days from this date, and shall be diligently prosecuted until patents have been obtained.

It is further agreed that any failure on the part of the party of the second part, to so sink said shaft or prosecute said applications for patent, shall work a full forfeiture of their rights under this contract.

And on the part of the said parties of the first part, it is agreed that the said one-half interest so conveyed, is and shall remain free from all liens or encumbrances. It is also agreed by the parties hereto that any machinery or shaft-houses placed upon the said property, one-half of the cost of the same shall be taken from the first product of the mine: Provided however that if no mineral is found therein the machinery shall remain the property of the said parties of the second part.

15 In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

(S'g'd)

THEODORE C. STEBBINS. [SEAL.]
LYMAN ROBISON. [SEAL.]
HARVEY HOWARD. [SEAL.]
SAMUEL J. GLOVER. [SEAL.]
WM. F. PATRICK. [SEAL.]
FRANK J. BOWMAN. [SEAL.]

STATE OF COLORADO, } ss:
County of Lake, }

I, James R. Hammond, a notary public in and for said county and State aforesaid, do hereby certify that Theodore C. Stebbins, Lyman Robison, and William F. Patrick, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and notarial seal this 17th day of February, A. D. 1882.

[SEAL.] J. R. HAMMOND,
Notary Public.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that on this 6th day of March, 1882, before me, a notary public within and for the city of St. Louis & State of Missouri, came Frank J. Bowman, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, and he acknowledged the same to be his act & deed for the purposes therein mentioned.

In testimony whereof I have hereunto set my hand & notarial seal the day & year last above written.

[SEAL.] GEO. P. WOLFF,
Notary Public, City of St. Louis, Mo.

My commission expires June 27, 1885.

16 THE STATE OF OHIO, } ss:
Wayne County, }

I, Lucas Flattery, a notary public within and for said county, hereby certify that Harvey Howard, — is president of the Wooster Mining Company, personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing, appeared before me this day in person and acknowledged that he signed and sealed the foregoing instrument as his free and voluntary act and deed for the purposes therein expressed.

In witness whereof I have hereunto set my hand and notarial seal this 8th day of March, A. D. 1882.

[SEAL.] LUCAS FLATTERY,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Chalkley J. Hambleton, a notary public in and for said county of Cook, in the State of Illinois, do hereby certify that Samuel J. Glover, personally known to me as the same person whose name is subscribed to the foregoing instrument of writing, appeared before

me this day in person and acknowledged that he signed, sealed, and delivered said instrument as his free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and notarial seal this 13th day of March, A. D. 1882.

[SEAL.] C. J. HAMBLETON,
Notary Public.

14. Defendants further allege that upon the execution and delivery of said contract by all the parties thereto the said plaintiff and the defendant William F. Patrick duly entered upon the
17 performance thereof, and on or about the 18th day of March, A. D. 1882, commenced sinking the shaft provided for in said contract on said Col. Sellers lode; that by agreement between the plaintiff and defendant William F. Patrick the said Patrick was to superintend, manage, and control the development of said property under said contract at their equal expense and for their joint benefit; that after said work had been commenced and long before the completion thereof and, to wit, the — day of April, A. D. 1882, the plaintiff assigned and transferred for a good and valuable consideration the undivided one-third of his right, title, and interest in and to said contract so made as aforesaid by the plaintiff and William F. Patrick with the owners of said mining property to the defendant James M. Patrick, and by the terms of said assignment the said plaintiff agreed to assume and pay for and on behalf of the said James M. Patrick his proportionate share of the costs and expenses of developing said property under said contract; that afterwards and on, to wit, the 6th day of May, A. D. 1882, for a good and valuable consideration the plaintiff sold, assigned, and transferred the undivided one-fourth of his right, title, and interest in and to said contract to one William H. Wilson, of the city of Leadville, State of Colorado, and the said Wilson, on the 11th day of May, A. D. 1882, sold and assigned said interest to one John Livezey, Jr., of said city, leaving after said sale, assignment, and transfer to said James M. Patrick and William H. Wilson still remaining in said plaintiff an undivided ten forty-eighths interest in said contract, and no more and no other or greater interest in said contract or in the property therein described was afterwards acquired by said plaintiff.

15. Defendants further allege that it was agreed between the plaintiff and said defendant, William F. Patrick, that said
18 Patrick should from time to time notify said plaintiff of the expenditures made by him, said Patrick, in and about the development of said property and the performance on their part of said agreement, and that immediately on receiving notice thereof the said plaintiff would remit to said Patrick his proportionate share of such costs and expenditures from time to time as the same should be required; that on the 19th day of June, A. D. 1882, the defendant William F. Patrick had expended for the sinking of the shaft upon said Col. Sellers lode and for other expenses attending the performance of said contract the sum of fourteen hundred seventy-four

and $\frac{46}{100}$ dollars ($1,474.46) and notified the plaintiff that his proportionate share of said costs and expenses, exclusive of the interest sold and assigned to said Wilson and by him assigned to said Livezey, amounted to the sum of five hundred fifty-two and $\frac{93}{100}$ dollars ($552.93), which said sum was paid by said plaintiff to said William F. Patrick by said Patrick giving to the plaintiff credit for the sum of two hundred sixty-four and $\frac{23}{100}$ dollars ($264.23), expenses claimed to have been incurred by the plaintiff in and about the private business of said Patrick, and the residue thereof, viz., the sum of two hundred eighty-eight and $\frac{70}{100}$ dollars ($288.70), was settled by said plaintiff by the execution and delivery of a certain promissory note to said Patrick of that date for said sum, payable in ninety days thereafter.

16. Defendants further allege that at the time of the commencement of the work of sinking the shaft upon said Col. Sellers lode by the plaintiff and said William F. Patrick, under and in pursuance of the contract aforesaid, other parties had located a mining claim, called the Little Hope lode, covering substantially the same ground embraced within the surface boundaries of said Col. Sellers
19 and Accident lode mining claims and had set up title to the same by virtue of their alleged compliance with the laws of the United States and of the State of Colorado regulating the location and pre-emption of mining claims, and were engaged in sinking a shaft upon said ground with the expectation of discovering mineral in rock in place before the same could be discovered by the plaintiff and defendant within said premises and thus claim said premises by virtue of a prior discovery of mineral; that thereu[illegible] conflicts arose between the owners of said Col. Sellers and Acci[illegible] lodes, and the parties claiming under said other location known as the Little Hope lode, and suits were commenced for the purpose of determining the title to said property between said conflicting claimants involving a large expense to the plaintiff and defendant William F. Patrick in protecting and defending the title to said Col. Sellers and Accident lodes.

17. That at the time of said settlement, on the 19th day of June, A. D. 1882, between the plaintiff and defendant William F. Patrick the said plaintiff became dissatisfied with the manner in which the work of developing said mining property was being conducted under the directions of the defendant William F. Patrick and urged upon said Patrick that no more work should be done upon said claims than would amount to a technical compliance with the terms of said contract; in other words, that a small amount of work should be done once in each ten days of the time mentioned in said contract, and thus prevent a forfeiture thereof by the plaintiff and said Patrick; that plaintiff complained of the expense attending the development of said property and the costs of the litigation aforesaid and expressed a desire to be relieved of the same; that said William F. Patrick refused, after being advised by his attorney, to comply with the demands of the plaintiff in re-
20 gard to the manner of working and developing said property as above stated.

18. Defendants further aver that it became necessary, in order

to protect and defend their title to said property, to sink said shaft diligently and with all possible speed so as to disclose the mineral therein, as required by law, before it could be discovered by the parties claiming under the aforesaid Little Hope location, and as the plaintiff was not willing to continue the work in the manner that it had been theretofore carried on, and as the defendant William F. Patrick desired to continue said work diligently and actively for the reasons aforesaid, negotiations were commenced on or about the twenty-second day of June, A. D. 1882, between the plaintiff and the defendant William F. Patrick for the sale and assignment by the plaintiff of all his interest in said contract to said defendant, and said negotiations were continued until on or about the 5th day of July, A. D. 1882, at which time said Patrick had expended for the joint benefit of himself, said Bowman, and Livezey the further sum of two thousand five hundred thirty-nine and $\frac{55}{100}$ dollars ($2,539.55) in working and developing said property under said contract; that the plaintiff's proportionate share of said expenditures amounted to the sum of nine hundred fifty-two dollars and $\frac{32}{100}$ ($952.32); that he was notified of said indebtedness and payment thereof was demanded by the said Patrick, but the plaintiff refused to pay the same or any part thereof, whereby the defendant William F. Patrick became seriously embarrassed, and thereupon notified the plaintiff that unless he would bear his proportion of the burdens of said contract he, said Patrick, would abandon the same and apply to the owners of said property for a new contract on his own behalf; that said negotiation for the sale of the plaintiff's interest in said contract to said Patrick were thereupon resumed, and on, to wit, the 28th day of August, A. D. 1882, the plaintiff being still in default of payment of said sum of nine hundred fifty-two and $\frac{32}{100}$ dollars and of his share of the expense of working said property that had accrued from said 5th day of July, A. D. 1882, amounting to the sum of about one thousand dollars ($1,000.00), and being unwilling to pay the same, the plaintiff executed and forwarded to the defendant at Leadville, Colorado, his certain agreement in writing, whereby, in consideration of the payment by the said Patrick of his said promissory note dated June 19th, A. D. 1882, executed and delivered by the plaintiff to said Patrick and by him assigned and endorsed to one Thomas W. McManus, of St. Louis, Missouri, when the same should become due, and the further consideration that said Patrick should release said Bowman from any and all liabilities under said contract so made as aforesaid with the owners of said mining property, and to save the plaintiff from any and all such liability, he, said plaintiff, agreed to release and surrender to said Patrick all his remaining interest in and to the said contract, reserving and excepting for the use of the defendant James M. Patrick a one-sixth interest therein, which had theretofore been assigned to him as aforesaid, and also agreed to execute and deliver a good and sufficient deed of conveyance of his right, title, and interest in and to the mining property described in said contract; that immediately upon the receipt by the said Patrick of said agreement so executed and delivered by the said plaintiff said Patrick accepted the same and

paid said note when the same became due and duly and fully kept and performed all and singular the terms and conditions of said agreement to be kept and performed on his part, all of which was well known to the plaintiff.

19. Defendants further allege that on or about the 19th day of October, A. D. 1882, and after the performance by the
22 defendant William F. Patrick of said last-named agreement the said plaintiff, in consideration thereof, executed and delivered to said Patrick his certain deed of *w*uitclaim of and for all his right, title, and interest in and to said Col. Sellers and Accident lodes described in said contract; that the interest so conveyed was an undivided five forty-eighths of said premises and no more.

And these defendants deny all the said bill charges; without this, that there is any other matter, cause, or thing in the said plaintiff's said bill of complaint contained material or necessary for the defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied — true to the knowledge or belief of these defendants, — of which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct.

And humbly pray that they may be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAM F. PATRICK.
JAMES M. PATRICK,
By EDW'D CUNNINGHAM, JR., *His Sol'r*

EDW'D CUNNINGHAM, JR., &
EDW'D C. ELIOT,
Sol'rs for Defendants

UNITED STATES OF AMERICA,
State of Colorado, County of Lake, } ss:

William F. Patrick, being duly sworn, doth depose and say that he is one of the defendants named in the foregoing answer subscribed by him; that he has read the same and knows the contents
23 thereof, and that the facts stated and allegations therein contained are true of his own knowledge.

WILLIAM F. PATRICK.

Subscribed to by the said William F. Patrick before me and signed by him in my presence this 11th day of December, A. D. 1886.

[SEAL.] JAMES B. NOBLOCK,
Notary Public, Lake County, State of Colorado.

UNITED STATES OF AMERICA,
State and District of Colorado, } ss:

James M. Patrick, being duly sworn, doth depose and say that he is one of the defendants named in the foregoing answer subscribed

by him; that he has read the same and knows the contents thereof, and that the facts stated and allegations therein contained are true of his own knowledge.

JAMES M. PATRICK.

Subscribed to by the said James M. Patrick before me and signed by him in my presence this 30th of December, A. D. 1886, and sworn to by him before me the day and year above written.

[SEAL.] EDWARD F. BISHOP,
Clerk Dist. Court U. S., Dist. of Colorado.

And afterwards, to wit, on the twentieth day of May, A. D. 1887, there was filed in said cause a replication in words and figures following, to wit:

(*Replication.*)

U. S. Cir. C't, E. D. of Mo.

F. J. BOWMAN, Complainant,
vs.
WM. F. PATRICK *et al.*, D'f'ts. } No. 2732. In Equity.

24 The replication of F. J. Bowman, the above-named complainant, to the answer of Wm. F. Patrick and James M. Patrick, the above defendants.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had and taken to the manifold insufficiencies of the said answer, for replication thereto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

E. McGINNISS.
Solicitor for Complainant.

And afterwards, to wit, on the eighth day of July, A. D. 1887, the following further proceedings were had and appear of record in said cause, to wit:

(*Amendments to Answer Filed by Leave.*)

FRANK J. BOWMAN, Complainant,
vs.
WILLIAM F. PATRICK *et al.*, Defendants. } 2732.

Now come defendants, by solicitor, and by leave of court file amendments to joint answer.

Said amendments to joint answer are in words and figures following, to wit:

(*Amendments to Joint Answer.*)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States for said Eastern Division of the Eastern District of Missouri.

FRANK J. BOWMAN, Complainant,
vs.
WILLIAM F. PATRICK and JAMES M. PATRICK, Defendants. } Cause No. 2732. In Equity.

The said defendants, William F. Patrick and James M. Patrick, leave of court thereto having been first obtained, make this amendment to their original answer herein heretofore filed, and, in addition to the matters and things set forth in their said answer, further answering, say:

15*a*. Defendants further allege that it was agreed between the plaintiff and said defendant, William F. Patrick, that said Patrick should from time to time notify said plaintiff of the expenditures made by him, said Patrick, in and about the development of said property and the performance on their part of said agreement, and that immediately on receiving notice thereof the said plaintiff would remit to said Patrick his proportionate share of such costs and expenditures from time to time as the same should be required; that on or about the 20th day of May, A. D. 1882, the defendant William F. Patrick had expended for the sinking of the shaft upon said Col. Sellers lode and for other expenses attending the performance of said contract the sum of fourteen hundred seventy-four and $\frac{50}{100}$ dollars ($1,474.50) and notified the plaintiff that his proportionate share of said costs and expenses, exclusive of the interest sold and assigned to said Wilson and by him assigned to said Livezey, amounted to the sum of five hundred fifty-two and $\frac{93}{100}$ dollars ($552.93), which said sum was paid by said plaintiff to said William F. Patrick on the 19th day of June, A. D. 1882, by said Patrick giving to the plaintiff credit for the sum of two hundred sixty-four and $\frac{23}{100}$ dollars ($264.23), expenses claimed to have been incurred by the plain-

tiff in and about the private business of said Patrick, and the residue thereof, viz., the sum of two hundred eighty-eight and $\frac{70}{100}$ dollars ($288.70), was settled by the plaintiff by the execution and delivery of a certain promissory note to said Patrick of that date for said sum, payable in ninety days thereafter.

18*a*. Defendants further aver that it became necessary, in order to protect and defend their title to said property, to sink said shaft diligently and with all possible speed, so as to disclose the mineral therein as required by law, before it could be discovered by the parties claiming under the aforesaid Little Hope location, and as the plaintiff was not willing to continue the work in the manner that it had been theretofore carried on, and as the defendant William F. Patrick desired to continue said work diligently and actively for the reasons aforesaid, negotiations were commenced on or about the 22nd day of June, 1882, between the plaintiff and the defendant William F. Patrick for the sale and assignment by the plaintiff of all his interest in said contract to said defendant, and said negotiations were continued until on or about the 16th day of July, 1882, at which time said Patrick had expended for the joint benefit of himself, said Bowman, and Livezey more than two thousand five hundred dollars ($2,500) in working and developing said property under said contract; that the plaintiff's proportionate share of said expenditures amounted to more than nine hundred dollars and remained unpaid.

27

That on the 16th day of July, 1882, said Bowman, being then ill in default of payment of his said share of more than twenty-five hundred dollars ($2,500) of expenses as aforesaid and being unwilling to pay the same, did, by his certain letter bearing date at Saint Paul, Minnesota, on that day, and received by said William F. Patrick at Leadville, Colorado, about the 20th day of that month, and in reply to and acceptance of a previous written proposition of said William F. Patrick, bearing date the 22nd day of June, 1882, agree with said Patrick that in consideration of the premises of said Patrick to pay when due the aforesaid note of said Patrick for two hundred and eighty-eight dollars and seventy cents ($288.70), dated June 19th, 1882, and in further consideration of said Patrick's releasing him from and indemnifying him against all liabilities under the aforesaid contract with Stebbins and others, he, said Bowman, would surrender and transfer to said Patrick all his remaining interest in said contract.

Defendants further say that in pursuance of said agreement informally set forth in said letter of said Patrick, dated June 22nd, 1882, and in said letter of said Bowman dated July 16th, 1882, thereafter, to wit, on the 28th day of August, 1882, the plaintiff (having never paid any part of the aforesaid sum of more than twenty-five hundred dollars ($2,500) or any part of the expenses of sinking said shaft, incurred subsequent to the 20th day of May, 1882), did, at camp, near Brule river, Wisconsin, execute and forward to said William F. Patrick, at Leadville, Colorado, his certain formal contract in writing, bearing date said 28th day of Au-

gust, 1882, whereby, in consideration of the payment by the
28 said William F. Patrick of plaintiff's said promissory note, dated June 19th, 1882, executed and delivered by the plaintiff to said Patrick and by him assigned and endorsed to one Thomas W. McManus, of St. Louis, Missouri, when the same should become due, and the further consideration that said Patrick should release said Bowman from any and all liabilities under said contract so made as aforesaid with the owners of said mining property, and to save the plaintiff from any and all such liability, he, the said plaintiff, agreed to release and surrender to the said Patrick all his remaining interest in and to the said contract, reserving and excepting for the use of the defendant James M. Patrick a one-sixth interest therein, which had theretofore been assigned to him as aforesaid; and said Bowman did in and by said contract also agree to execute and deliver a good and sufficient deed of conveyance of his right, title, and interest in and to the mining property described in said contract; that said contract was duly received by said Patrick; that immediately upon the receipt by the said Patrick of said agreement so executed and delivered by the plaintiff said Patrick accepted the same and paid said note when the same became due and duly and fully kept and performed all and singular the terms and conditions of said agreement to be kept and performed on his part, all of which was well known to the plaintiff.

JAMES M. PATRICK.

EDW'D CUNNINGHAM, JR.,
EDW'D C. ELIOT,
Sol'rs for Def'ts.

.nd, I.
nswer,

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

James M. Patrick, being duly sworn, on his oath says he is one of the defendants in the above-entitled cause; that he has
29 read the foregoing amendments to the answer of defendants, and that he believes the matters and things therein stated to be true.

JAMES M. PATRICK.

Subscribed and sworn to by James M. Patrick this 27th day of June, A. D. 1887, before me—

[SEAL.]

GIST BLAIR,
Notary Public, St. Louis, Missouri.

STATE OF COLORADO, }
County of ——, } *ss:*

William F. Patrick, being duly sworn, on his oath says he is one of the defendants in the above-entitled cause; that he has read the foregoing amendments to the answer of defendants; that he is familiar with the facts therein set forth, and that the matters and things therein stated are true.

WILLIAM F. PATRICK.

Subscribed and sworn to by William F. Patrick this fifth day of July, A. D. 1887, before me—

[SEAL.] JAMES B. KNOBLOCK,
Notary Public.

And afterwards, to wit, on the twelfth day of July, A. D. 1887, there was filed in said cause a replication to the amendments to the answer in words and figures following, to wit:

(*Replication to Amendments to Answer.*)

U. S. Cir. C't, E. D. of Mo.

FRANK J. BOWMAN, Complainant,
vs.
WM. F. PATRICK & JAMES PATRICK, Defendants. } No. 2732.

30 Replication to amendments to answer.

The above-named complainant, saving and reserving to himself now and at all times hereafter all and all manner of benefits and advantage of exception which may be had and taken to the manifold insufficiencies of the amendments to the answer of above-named defendants, for replication thereto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that said amendments to said answer of said defendants are uncertain, untrue, and insufficient to be replied unto by repliant; without this, that any other thing or unwillingness whatsoever in the said amendments to said answer contained Saint material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

E. McGINNISS,
Solicitor for Complainant.

And afterwards, to wit, on the twenty-sixth day of September, A. D. 1887, the following further proceedings were had and appear of record in said cause, to wit:

(*Motion to Strike Out Certain Exhibits Filed.*)

FRANK J. BOWMAN, Complainant,
vs.
WILLIAM F PATRICK *et al.*, Defendants. } 2732.

Now come defendants, by solicitor, and file motion to strike out certain exhibits from complainant's proof; which motion is argued and submitted and by the court taken under advisement.

31 Said motion is in words and figures following, to wit:

(*Motion to Strike Out Certain Exhibits.*)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri.

FRANK J. BOWMAN, Complainant,
vs.
WILLIAM F. PATRICK and JAS. M. PATRICK, Defendants.
No. 2732. In Equity.

The said defendants now move the court to rule upon the certain matters specially certified to the court by L. L. Walbridge, Esqr., special examiner, and to suppress the certain exhibits referred to in said certification—that is to say, "Exhibit 2," being letter dated Knoxville, August 21st, 1882, from Annie to Jennie; Exhibit 3, being letter dated Bradley Quarry, August 28th, 1882, from James M. Patrick to his wife, Fanny, and Exhibit 4, being letter dated Bradley, August 20th, 1882, from James M. Patrick to his wife.

EDW'D CUNNINGHAM, JR., AND
EDW'D C. ELIOT,
Solicitors for Def'ts.

And afterwards, to wit, on the twenty-eighth day of September, A. D. 1887, the following further proceedings were had and appear of record in said cause, to wit:

Motion to Strike Out Certain Exhibits Sustained.

FRANK J. BOWMAN, Complainant,
vs.
WILLIAM F. PATRICK *et al.*, Defendants.
2732.

Now come the parties, by their solicitors, and the court,
32 having considered the defendants' motion heretofore submitted to suppress certain exhibits to testimony, orders that said motion be, and the same is hereby, sustained and it is ordered that Exhibit "2," being letter dated Knoxville, Aug. 21st, 1882, from Annie to Jennie; Exhibit "3," being letter dated Bradley, Aug. 28th, 1882, from James M. Patrick to his wife, Fanny, and Exhibit "4," being letter dated Bradley, Aug. 20th, 1882, from James M. Patrick to his wife, be, and they are hereby, suppressed in said cause and struck from the files.

Complainant thereupon excepts to the order of the court in this matter.

And afterwards, to wit, on the thirtieth day of March, A. D. 1888, the following further proceedings were had and appear of record in said cause, to wit:

(*Appearance of Alexander Martin; Case Heard in Part.*)

FRANK J. BOWMAN, Complainant,
vs.
WILLIAM F. PATRICK *et al.*, Defendants. } 2732.

Now comes Alexander Martin and enters his appearance as of counsel for the complainant herein.

And this cause being regularly called for hearing and both parties being ready, said cause was heard in part.

And afterwards, to wit, on the thirty-first day of March, A. D. 1888, the following further proceedings were had and appear of record in said cause, to wit:

(*Case Submitted.*)

FRANK J. BOWMAN, Complainant,
vs.
WILLIAM F. PATRICK *et al.*, Defendants. } 2732.

33 Now again come the same parties as on yesterday and said cause was further heard, and, after the arguments of counsel, said cause was submitted and by the court taken under advisement and leave given parties to file briefs.

And afterwards, on the eighteenth day of September, A. D. 1888, the following further proceedings were had in said cause and appear of record, to wit:

(*Interlocutory Decree.*)

FRANK J. BOWMAN Complainant,
vs.
WILLIAM F. PATRICK and JAMES M. PATRICK, Defendants. } 2732.

This cause came on to be heard at this term and was argued by counsel, and thereupon and upon consideration thereof the court doth declare that complainant, Frank J. Bowman, is entitled to have the sale made by him to defendant William F. Patrick on October 19th, 1882, of an undivided five forty-eighths of the Col. Sellers and Accident mining lodes, situated on Iron hill, in California mining district, Lake county, State of Colorado, set aside and have a reconveyance of said five forty-eighths of said property and its appurtenances and improvements and machinery thereon made to him by defendant William F. Patrick and have paid to him by defendant William F. Patrick all dividends received on and from said five forty-eighths of said property by the defendant William F. Patrick since October 19th, 1882, with interest at the rate of six per cent. per annum from the date it was received by defendant William F. Patrick, he being allowed as credits on the amount due from him to complainant, F. J. Bowman, all moneys paid by him and which

have not been repaid to him for and on account of said five forty-eighths of said property for sinking the shaft and other ex-
34 penses incurred in opening and developing said Col. Sellers and Accident mines, with interest at the rate of six per cent. per annum on each of said payments from the date it was made by him; and the court doth order and decree that it be referred to George H. Shields, as master, to take an account between complainant, F. J. Bowman, and defendant William F. Patrick in accordance with the declarations hereinbefore made and report to the court the balance due to complainant, F. J. Bowman.

And the court doth order and decree that Henry T. Kent be, and is hereby, appointed receiver on giving bond in the sum of ten thousand dollars to acquire, collect, receive, and hold until the further order of this court the said five forty-eighths of said property and the issues, profits, and dividends thereof now earned but unpaid and those hereafter accruing, and the court doth order the defendant William F. Patrick to execute, acknowledge, and deliver to said receiver within ten days after said receiver has executed the bond aforesaid a deed of conveyance, with covenant of special warranty against the acts of him, the said Patrick, and those claiming under him, of said five forty-eighths of said property and its appurtenances and improvements and machinery thereon, to wit, the Col. Sellers and Accident mining lodes, situated on Iron hill, in California mining district, Lake county, State of Colorado, being the same property described in the following deeds and patents recorded in the recorder's office of said Lake county, as follows, to wit: The deed from Lyman Robison *et al.* to F. J. Bowman and Wm. F. Patrick, dated February 17th, 1882, and recorded in Deed Book No. 81, page 563; the deed from F. J. Bowman to Wm. F. Patrick, dated October 19th, 1882, and recorded in Deed Book No. 81, page 564; the United States patent No. 9751 (survey lot No. 2495) for the Col. Sellers mine to Lyman Robison *et al.*, recorded in Book C of Patents, page 125; the United States patent No. 10168
35 (survey lot No. 2496) for the Accident mine to Lyman Robison *et al.*, recorded in Book B of Patents, page 526.

And the court doth order and decree that until the further order of this court the defendant William F. Patrick, his agents and servants, each and every of them, be, and are hereby, enjoined, restrained, and commanded to refrain from in anywise interfering with the custody of and control by said receiver of said five forty-eighths of said property and the collection and receipt by him of the issues, profits, and dividends now earned but unpaid and those hereafter accruing from said five forty-eighths of said property.

This cause is dismissed as to the defendant James M. Patrick.

The matter of costs and all further orders and decrees are reserved for the further consideration of the court.

Sept. 18th, 1888.

(Signed) DAVID J. BREWER,
Circuit Judge.

And afterwards, to wit, on the twenty-first day of September, A. D. 1888, the following further proceedings were had and appear of record in said cause, to wit:

Bond of Receiver Approved.

F. J. BOWMAN, Complainant,
vs.
WILLIAM F. PATRICK, Defendant. } 2732.

Now comes Henry T. Kent, heretofore appointed receiver herein, and presents to the court his bond as such receiver in the penal sum of ten thousand ($10,000) dollars, with James A. Seddon, James L. Blair, and Charles W. Bullen as sureties thereon; which bond is approved by the court and ordered to be filed and made part of the record in this cause.

36 And afterwards, to wit, on the thirteenth day of October, A. D. 1888, there was filed in said cause a motion to stay proceedings in words and figures following, to wit:

(*Motion to Stay Proceedings.*)

In the United States Circuit Court for the Eastern Division of the Eastern District of Missouri.

FRANK J. BOWMAN, Complainant,
vs.
WILLIAM F. PATRICK *et al.*, Defendants. } No. 2732. In Equity.

And now comes Wm. F. Patrick, one of the defendants in the above-entitled cause and against whom the interlocutory decree was made and entered on the 18th day of September, 1888, and represents to this court that he is informed and believes that Dennis P. Slattery, a citizen of the State of Missouri and a resident of the city of St. Louis, claims to own and hold all the interest of complainant in this cause; that complainant's counsel have informed and notified affiant that such interest as Frank J. Bowman had in the subject-matter of this suit has been assigned, *pendente lite*, to the said Dennis P. Slattery.

Defendant Wm. F. Patrick further represents to the court that Frank J. Bowman, complainant, is insolvent, and that there are many creditors having claims against him in the State of Missouri, at the hands of whom this defendant is likely to be much harassed and troubled in respect of any money which may be held to be due from him to said Bowman, and that he, defendant, has already been served with process of garnishment and attachment from the circuit court of the city of St. Louis respecting the expected indebtedness to be shown by the final decree in this cause, and which har-
37 assment is and will be unnecessary if the said Dennis P. Slattery is in fact the real party in interest in this litigation.

To the end, therefore, that the said Dennis P. Slattery be made a

party to this cause, and that the accounting ordered herein may be had at his instance and for his benefit, and that the defendant herein may be protected against all claims in respect of the subject-matter of this suit by the final decree to be rendered herein, and that he may be enabled to perform such decree as the court shall make toward the real person interested in this suit, the said Patrick prays the court to stay all further proceedings in this cause against this defendant until the said Dennis P. Slattery shall by his voluntary intervention in this cause be made party complainant in place of said Bowman or until the present complainant shall have by proper process brought in the said Slattery as party to this proceeding, and that a copy of the interlocutory decree rendered herein be served upon the said Slattery in conformity with the proper procedure in such cases.

WM. F. PATRICK,
By his solicitors, CUNNINGHAM & ELIOT.

STATE OF MISSOURI, } ss:
City of St. Louis, }

William F. Patrick, being duly sworn, upon his oath says that the matters and facts in the above motion contained are true, as he verily believes.

WILLIAM F. PATRICK.

Subscribed and sworn to before me this 13th day of October, A. D. 1888.

[SEAL.] GIST BLAIR,
Notary Public, St. Louis, Missouri.

38 And afterwards, to wit, on the twenty-fourth day of December, A. D. 1888, there was filed in said cause a report of the receiver in the words and figures following, to wit:

(*Report of Receiver.*)

UNITED STATES OF AMERICA, } ss:
Eastern Division of the Eastern Judicial District of Missouri, }

In the Circuit Court of the United States in and for the Eastern Division of said Judicial District.

FRANK J. BOWMAN, Complainant,
vs.
WM. F. PATRICK and JAMES M. PATRICK, Defendants. } 2732. No. 1.

To the honorable the circuit judges of the circuit court of U. S. for the division aforesaid:

Now comes Henry T. Kent, appointed by the honorable court on the 18th day of September, A. D. 1888, receiver herein and duly qualified on the 21st day of September, and respectfully reports to the court that the defendant William F. Patrick did, on the last day of October last, in the performance of the order of this court,

convey by proper deed to me as receiver of the property therein so ordered to be conveyed; that since said conveyance your receiver has been paid two dividends, being No. 36 and 37 of the Col. Sellers mine, amounting respectively to $1,873.15 and $1,873.13 and aggregating the sum of $3,746.28; that your receiver, reserving the right to question the accuracy of the amounts and statements submitted to him from time to time by the said defendant, Patrick, hereafter, reports to the court that under the statements made the said defendant, Patrick, has wrong-
39 fully withheld from the receiver ten per cent. of said dividends. Your receiver reports the facts to be that long prior to the decree of this honorable court in this cause the owners of the Minnie Y. mine, situated adjacent to the Col. Sellers mine, the property covered by this decree, brought suit in the U. S. circuit court for district of Colorado against the owners of the Col. Sellers mine for ores taken by them from the Minnie Y. and recovered a judgment for $20,000; that said judgment has been appealed from and the suit is now pending in the Supreme Court of the United States; that it is claimed that said ten per cent. of the dividends as aforesaid is for the purpose of providing a fund for the payment of said judgment in the event the same is affirmed; that said ores so extracted were sold and the proceeds received by the defendant and which were paid him long prior to this decree, and in the event of the affirmance of said judgment in the Supreme Court of the United States said funds now in the hands of said defendant should respond to the payment of its proportionte share; that your receiver brings this to the attention of the court for the reason that he is informed that said sums so to be retained by defendant will aggregate a large amount, and that the same are withheld by defendant in express violation of the orders and injunctions of this court.

Wherefore your receiver prays that your honors make such orders in the premises as the nature of the case may require and to your honors shall seem meet and proper.

HENRY T. KENT, *Receiver.*

And afterwards, to wit, on the said twenty-fourth day of December, A. D. 1888, there was filed in said cause an application of D. P. Slattery to be made party complainant in words and figures
40 following, to wit:

(*Application of D. P. Slattery to be Made Party Compl't.*)

In the Circuit Court of the United States for the Eastern District of Missouri (Eastern Division).

FRANK J. BOWMAN, Complainant,
vs.
WM. F. PATRICK *et al.*, D'f'ts. } No. 2732. In Equity.

Now comes Dennis P. Slattery, and in response to the motion of defendants filed herein says that the complainant, Frank J. Bow-

man, has assigned to him whatever decree may be rendered in favor of said Bowman by this court in this cause, and that said assignment was delivered by said Bowman to Henry D. Laughlin as an escrow for said Slattery and to be delivered by said Laughlin to said Slattery immediately upon the rendition by this court of the final decree in this cause.

Wherefore he, the said Slattery, prays the court to be made a party complainant to this cause, and that the cause henceforth proceed in the name of said Frank J. Bowman to and for the use and benefit of said Dennis P. Slattery.

DENNIS P. SLATTERY,
By his solicitor, E. McGINNIS.

And on the same day, to wit, the twenty-fourth day of December, A. D. 1888, there was filed in said cause consent of F. J. Bowman that cause proceed in his name to and for the use of D. P. Slattery in words and figures following, to wit:

(*Consent of F. J. Bowman that Cause Proceed in His Name to and for the Use of D. P. Slattery.*)

41 In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

FRANK J. BOWMAN, Complainant,
vs.
WM. F. PATRICK *et al.*, D'f'ts. } No. 2732. In Equity.

Now comes the complainant, Frank J. Bowman, and says he has assigned the decree to be rendered in this cause to Dennis P. Slattery, as stated in the application of said Slattery to be made a party complainant to this cause, and consents that this cause henceforth proceed in the name of Frank J. Bowman, to and for the use and benefit of Dennis P. Slattery, his assignee.

FRANK J. BOWMAN,
Per E. McGINNIS, *His Solicitor.*

And on the same day, to wit, on the twenty-fourth day of December, A. D. 1888, the following further proceedings were had and appear of record in said cause, to wit:

(*Order Making D. P. Slattery Party Complainant.*)

FRANK J. BOWMAN, Complainant,
vs.
WILLIAM F. PATRICK, Defendant. } 2732.

Upon motion of defendants made on Oct. 13, 1888, and responses thereto filed this day by Frank J Bowman and Dennis P. Slattery, and upon hearing from all parties concerning same and upon consideration thereof, the court doth order that said Dennis P. Slattery be made a party complainant to this cause, which is hereby done, and that the cause henceforth proceed in the name of Frank J.

Bowman, to and for the use and benefit of said Dennis P. Slattery, subject to the rights of Wm. & J. Ellison and R. S. McDon-
42 ald, intervenors herein, if it shall be found that they have any rights or anything be due or owing them or either of them.

(Signed) DAVID J. BREWER,
Circuit Judge.

And on the same day, to wit, on the twenty-fourth day of December, A. D. 1888, the following further proceedings were had and appear of record in said cause, to wit:

(*Order Amending Decree.*)

FRANK J. BOWMAN, Complainant,
vs.
WILLIAM F. PATRICK, Defendant. } 2732.

Upon motion this day by complainant and upon hearing from all parties concerning same and upon consideration thereof, the court doth order that, in accordance with said motion, the interlocutory decree rendered herein on Sept. 18, 1888, be amended by interlineation by inserting the words "and ore-tailings dumps" between the words "machinery" and "thereon" wherever they occur (which is in two places only), and the words "and assignment" between the phrases "a deed of conveyance" and "with covenant" in said decree.

And that said defendant, William F. Patrick, execute and deliver to the receiver, Henry T. Kent, a proper deed of conveyance and assignment of the ore-tailings dumps in accordance with said decree as amended within ten days from date of amendment.

The costs of this motion and execution of said deed to be paid by complainant.

(Signed) DAVID J. BREWER,
Circuit Judge.

Said decree as amended is in words and figures following, to wit:

"This cause came on to be heard at this term and was
43 argued by counsel, and thereupon and upon consideration thereof the court doth declare that complainant, Frank J. Bowman, is entitled to have the sale made by him to defendant William F. Patrick on October 19th, 1882, of an undivided five forty-eighths of the Col. Sellers and Accident mining lodes, situated on Iron hill, in California mining district, Lake county, State of Colorado, set aside, and have a reconveyance of said five forty-eighths of said property and its appurtenances and improvements and machinery and ore-tailings dumps thereon made to him by defendant William F. Patrick, and have paid to him by defendant William F. Patrick all dividends received on and from said five forty-eighths of said property by the defendant William F. Patrick since October 19th, 1882, with interest on each dividend at the rate of six per cent.

per annum from the date it was received by defendant William F. Patrick, he being allowed as credits on the amount due from him to complainant, F. J. Bowman, all moneys paid by him and which have not been repaid to him for and on account of said five forty-eighths of said property for sinking the shaft and other expenses incurred in opening and developing said Col. Sellers and Accident mines, with interest at the rate of six per cent. per annum on each of said payments from the date it was made by him; and the court doth order and decree that it be referred to George H. Shields, as master, to take an account between complainant, F. J. Bowman, and defendant William F. Patrick in accordance with the declarations hereinbefore made, and report to the court the balance due to complainant, F. J. Bowman.

And the court doth order and decree that Henry T. Kent be, and he is hereby, appointed receiver on giving bond in the sum of ten thousand dollars to acquire, collect, receive, and hold until the further order of this court the said five forty-eighths of said property and the issues, profits, and dividends thereof now earned
44 but unpaid and those hereafter accruing, and the court doth order the defendant William F. Patrick to execute, acknowledge, and deliver to said receiver within ten days after said receiver has executed the bond aforesaid a deed of conveyance and assignment with covenant of special warranty against the acts of him, the said Patrick, and those claiming under him of said five forty-eighths of said property and its appurtenances and improvements and machinery and ore-tailings dumps thereon, to wit, the Col. Sellers and Accident mining lodes, situated on Iron hill, in California mining district, Lake county, State of Colorado, being the same property described in the following deeds and patents recorded in the recorder's office of said Lake county, as follows, to wit: The deed from Lyman Robison *et al.* to F. J. Bowman and Wm. F. Patrick, dated February 17th, 1882, and recorded in Deed Book No. 81, page 563; the deed from F. J. Bowman to Wm. F. Patrick, dated October 19th, 1882, and recorded in Deed Book No. 81, page 564; the United States patent No. 9751 (survey lot No. 2495) for the Col. Sellers mine to Lyman Robison *et al.*, recorded in Book C of Patents, page 125; the United States patent No. 10168 (survey lot No. 2496) for the Accident mine to Lyman Robison *et al.*, recorded in Book B of Patents, page 526; and the court doth order and decree that until the further order of this court the defendant, William F. Patrick, his agents and servants, each and every of them be, and are hereby, enjoined, restrained, and commanded to refrain from in anywise interfering with the custody of and control by said receiver of said five forty-eighths of said property and the collection and receipt by him of the issues, profits, and dividends now earned but unpaid and those hereafter accruing from said five forty-eighths of said property.

This cause is dismissed as to the defendant James M. Patrick.

The matter of costs and all further orders and decrees are
45 reserved for the further consideration of the court.

Sept. 18th, 1888.

(Signed) DAVID J. BREWER,
Circuit Judge."

And on the same day, to wit, on the twenty-fourth day of December, A. D. 1888, the following further proceedings were had and appear of record in said cause, to wit:

(*Order on Patrick to Show Cause.*)

FRANK J. BOWMAN, Complainant,
vs.
WILLIAM F. PATRICK, Defendant. } 2732.

Upon report and motion this day made by Henry T. Kent, receiver herein, and upon hearing from all parties concerning same and upon consideration thereof, the court doth order that the defendant, Wm. F. Patrick, do show cause by first of the next term of this court (the 18th day of March, 1889) why he should not be attached for contempt of court for violation of the court's decree of Sept. 18th, 1888, as specified in said report and motion of said receiver.

(Signed) DAVID J. BREWER,
Circuit Judge.

And afterwards, to wit, on the eighteenth day of March, A. D. 1889, there was filed in said cause return of Wm. F. Patrick to the order to show cause in words and figures following, to wit:

(*Return to Order to Show Cause.*)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri.

In the Circuit Court of the United States in and for the Eastern Division of said District.

46 FRANK J. BOWMAN, Complainant,
vs.
WILLIAM F. PATRICK, Defendant. } In Equity. No. 2732.

Now comes Wm. F. Patrick, defendant in this cause, and, in obedience to the order of court entered herein on the 24th day of December, 1888, requiring him to show cause why he should not be attached for contempt of court for violation of the court's decree of September 18th, 1888, as specified in the report and motion of Henry T. Kent, receiver, made on said 24th day of December, 1888, respectfully shows to the court that the Col. Sellers mine is owned by a number of persons as copartners, who as such have the paramount control and direction of the operations and business of said mine, which operations and business are conducted as a partnership enterprise, under the immediate management of this defendant as financial agent and one C. L. Hill as manager for said owners.

Defendant further shows to the court that at a meeting of the owners of said mine held in the month of December, 1887, it was resolved that ten per cent. of the net earnings of said mine be set

aside, reserved from distribution, and paid over into the hands of J. J. Simmons, J. L. McNeil, and this defendant, as trustees, for the purpose of creating a fund from which to pay and satisfy, upon affirmance thereof, a certain judgment for about twenty thousand dollars ($20,000) theretofore rendered against said owners and in favor of the owners of the Minnie and A. Y. mine in a certain suit in the circuit court of the United States for the district of Colorado, from which judgment there then was and still is an appeal pending in the Supreme Court of the United States.

To that end said Patrick, as financial agent, and said Hill as managers were, by said resolution of said owners, ordered and
47 directed to set aside, reserve from distribution, and to turn over ten per cent. of all the net earnings of said mine to said Simmons, McNeil, and this defendant, as trustees, until the fund so created should be sufficient for the payment of said judgment; said fund to be applied by said trustees to that purpose should said judgment be affirmed by the Supreme Court of the United States, but should the final result of said suit be in favor of the owners of said Col. Sellers mine, then said fund so accumulated to be returned by said trustees to said owners.

Defendant further shows to the court that ever since said resolutions were passed and said instructions were given said Hill, as manager, and this defendant, as financial agent, have in obedience thereto set apart and withheld from distribution and paid over to said trustees ten per cent. of all net earnings of said mines and are still continuing so to do; that before proceeding to make the distributions of profits mentioned in the report and motion of the receiver filed herein on the 24th day of December, 1888, as "dividends numbered 36 and 37," ten per cent. of the earnings then accrued were so set apart, reserved from distribution, and paid over to said trustees; that all the net earnings so set apart, reserved from distribution, and paid over are now deposited in the State National bank at Denver, Colorado, subject to the joint check of said J. J. Simmons, J. L. McNeil, and this defendant as trustees and not otherwise.

Defendant further shows to the court that the sums so set apart do not yet amount to enough to pay said judgment. Defendants says he never had possession in his own right of any of said earnings so set apart, nor had he ever any authority or right to dispose of them otherwise then he has done as aforesaid.

The defendant further respectfully shows to the court that the interest in said mine held by the receiver herein has been
48 treated in the same manner in all respects as all other interests in said mine have been treated; that like all other interests the said interest in the receiver's hands is justly chargeable with the payment of the aforesaid judgment; that said judgment was rendered in respect of matters, the benefit of which accrued to said interest held by said receiver equally with the interests held by the other owners of said mine; that the former dividends paid to this defendant upon said five forty-eighths interest now held by the receiver, and with which dividends the defendant has been charged and the plaintiff has been credited in the accounting herein, arose

in part from the transactions out of which said judgment grew, and thus said five forty-eighths interest has received its full proportionate benefit therefrom, and that for that reason it would have been unjust to exempt said five forty-eighths interest from bearing along with other interests the burden of providing a fund for payment of said judgment.

Defendant respectfully shows to the court that if, in disregard and disobedience of the aforesaid resolution of the owners of said mine, the ten per cent. reserved from the distributions of profits referred to in the said report of the receiver as dividends 36 and 37 had been paid to said receiver, the said interest held by him would have been preferred to and put into a better position than the interests of any other owners of said mine, and said receiver would have thereby been given an advantage over other partners to which the interest he represents is not entitled; the partnership accounts would have thereby been confused and the other partners would have been injured, and this defendant, as financial agent, and the said C. L. Hill, as manager of said mine, would have been guilty of a breach of their duty to the owners.

This defendant expressly disclaims and denies any act or conduct or omission on his part in contempt or disobedience or
49 disregard of the order of this honorable court made herein on the 18 day of September, 1888, and any intention on his part to do otherwise than as it is his duty to do in the premises. On the contrary, it has at all times been, and now is, the wish and endeavor of this defendant to comply in good faith and fully with the directions and requirements of said order.

Wherefore this defendant prays that the rule made upon him may be discharged and that he be allowed his costs herein most wrongfully sustained.

WILLIAM F. PATRICK, *Defendant.*

CUNNINGHAM & ELIOT,
Solicitors for Def't.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

William F. Patrick, being duly sworn, on his oath says that he has read the foregoing return signed by him and is familiar with the contents thereof; that the matters and things therein stated as being of affiant's knowledge are true, and that as to the matters and things therein stated upon information and belief affiant believes them to be true.

Subscribed and sworn to this 12th day of March, 1889, before me—

[SEAL.] ALBION K. PARRIS,
Notary Public, D. C.

And afterwards, to wit, on the nineteenth day of March, A. D. 1889, the following further proceedings were had and appear of record in said cause, to wit:

(*Rule to Show Cause Discharged.*)

50 FRANK J. BOWMAN, to Use of, &c., Complainant,
vs.
WILLIAM F. PATRICK, Defendant. } 2732.

The order on William F. Patrick to show cause herein why he should not be attached for contempt for violation of the decree herein and the return to said order having been considered by the court, it is ordered that said rule be, and it is, discharged.

On the twenty-sixth day of January, A. D. 1889, there was filed in said cause a stipulation in words and figures following, to wit:

Stipulation Waiving Accounting.

In the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

FRANK J. BOWMAN, to the Use of DENNIS P. SLATTERY,
Complainant,
vs.
WM. F. and JAMES M. PATRICK, Defendants. } In Equity. No. 2732.

Stipulation.

It is hereby stipulated and agreed by the parties to the above-entitled cause that the balance in favor of the complainant which would be found by the special master appointed by the court if an accounting were had in conformity with the decree made September 18th, 1888, would be, on January 24th, 1889, the sum of fifty-six thousand six hundred and ninety dollars ($56,690.00); to which sum is to be added, after January 24th, 1889, until the date of the final decree, the sum of seven dollars fifty-eight cents seven mills ($7.587) per day as interest; and the parties further agree that the accounting ordered by said interlocutory decree of September 18th, 1888, is hereby waived.

Jan'y 25, '89.

E. McGINNIS,
Solicitor for Complainant and D. P. Slattery.
CUNNINGHAM & ELIOT,
Solicitors for Defendants.
W. B. THOMPSON,
Of Counsel for R. S. MacDonald.

And on the said nineteenth day of March, A. D. 1889, the following further proceedings were had and appear of record in said cause, to wit:

(*Final Decree.*)

FRANK J. BOWMAN, to the Use and Benefit of DENNIS P. SLATTERY, Complainant,
vs.
WILLIAM F. PATRICK and JAMES M. PATRICK, Defendants. } 2732.

1st. This cause coming on to be further heard and for final decree, and after hearing counsel, and upon consideration thereof, and it appearing to the court that the parties to the cause have agreed, by stipulation filed herein on January 26th, 1889, that the balance in favor of the complainant which would be found by the special master appointed by the court if an accounting were had in conformity with the interlocutory decree rendered in this cause on September 18th, 1888, would be, on January 24th, 1889, the sum of $56,690.00, to which is to be added the sum of $7.587 for each day from January 24th, 1889, to date of this the final decree, and that the parties have waived the accounting ordered by said interlocutory decree, it is therefore by the court now ordered, adjudged, and decreed that said agreement be and is approved and confirmed, and that
51 the balance on said accounting due and now to be paid by defendant, William F. Patrick, is the sum of fifty-seven thousand and ninety-nine and sixty-nine one-hundredths dollars ($57,099.69).

2nd. And it is further declared, ordered, adjudged, and decreed that the sale made on October 19th, 1882, by complainant, F. J. Bowman, to the defendant, William F. Patrick, of an undivided five forty-eighths of the Col. Sellers and Accident mining lodes, situated on Iron hill, in California mining district, Lake county, State of Colorada, be and is rescinded, and that defendant, William F. Patrick, should make a reconveyance and assignment of said undivided five forty-eighths of said property and its appurtenances, improvements, and machinery and ore-tailings dumps thereon; and it appearing to the court that defendant, William F. Patrick, has heretofore and in compliance with the said interlocutory decree and its amendment conveyed and assigned said undivided five forty-eight-s of said property and its appurtenances, improvements, and machinery and ore-tailings dumps thereon to Henry T. Kent as receiver in this cause, and that said receiver now holds the title thereto and has received and now holds the money paid as dividends on and from said undivided five forty-eighths of said property since September 18th, 1888, it is now ordered, adjudged, and decreed that said Henry T. Kent, as receiver, do, at the expiration of sixty days from this date, excepting Sundays, execute to complainant, F. J. Bowman, for the use and benefit of Dennis F. Slattery, a deed of conveyance and assignment, with covenants of special warranty, of said undivided five forty-eighths of said property and its appurtenances, improvements, and machinery and ore-tailings dumps thereof, to wit, the Col. Sellers and Accident mining lodes, situated on Iron hill, in California mining district, Lake county, State of Colorado, being the

same property described in the following deeds and patents
52 recorded in the recorder's office of said Lake county as follows: The deed from Lyman Robison *et al.* to F. J. Bowman and William F. Patrick, dated February 17th, 1882, and recorded in Deed Book No. 81, page 563; the deed from F. J. Bowman to William F. Patrick, dated October 19th, 1882, and recorded in Deed Book No. 81, page 564; United States patent No. 9751 (survey lot No. 2495) for the Col. Sellers mine to Lyman Robison *et al.*, recorded in Book C of Patents, page 125; the United States patent No. 10168 (survey lot No. 2496) for the Accident mine to Lyman Robison *et al.*, recorded in Book B of Patents, page 526.

3rd. And it is further ordered, adjudged, and decreed that said receiver then pay to F. J. Bowman, for the use and benefit of said Dennis P. Slattery, all money in his possession as such receiver less proper charges and credits to be ascertained, and that said receiver be continued in office until further order of the court.

4th. And it is further ordered, adjudged, and decreed that complainant, F. J. Bowman, for the use and benefit of said Dennis P. Slattery, do now have and recover of and from the defendant, William F. Patrick, the said sum of fifty-seven thousand and ninety-nine and sixty-nine one-hundredths dollars and complainant's costs of suit, to be taxed, and have execution for said sum of $57,099.69 and costs of suit.

5th. And it is further ordered, adjudged, and decreed that the bill be dismissed as to the defendant, James M. Patrick, and that he have judgment for his costs, to be taxed, and have execution therefor.

(Signed) DAVID J. BREWER,
Circuit Judge.

And afterwards, to wit, on the twentieth day of March,
53 A. D. 1889, there was filed in said cause a stipulation as to supersedeas and other matters in words and figures following, to wit:

(*Stipulation as to Supersedeas and Other Matters.*)

In the Circuit Court of the United States within and for the Eastern Division of the Eastern District of Missouri.

F. J. BOWMAN, to and for the Use of D. P. SLATTERY, Complainant,
vs.
WILLIAM F. PATRICK, Defendant.
} No. 2732. In Equity.

The parties hereto agree that if the defendant, William F. Patrick, shall take an appeal from the final decree in this cause and execute a supersedeas bond, with sureties satisfactory to the court, then the penalty of said bond shall be ($85,000.00) eighty-five thousand dollars, to secure the payment of the money part of said decree and all interest, costs, and damages, and that in lieu of bond for the

performance of the other part of the decree the property and money now in the hands of the receiver and all that may hereafter come into his hands pending the appeal and while said supersedeas bond is in force shall remain in his possession while said supersedeas remains in force, but not after the expiration of twenty days next after the rendition of the judgment of the Supreme Court if the Supreme Court shall affirm the decree of the circuit court, unless a motion for rehearing shall be filed by said Patrick within said twenty days and while the supersedeas bond is in force, in which event the receiver is to retain possession until said motion is decided by the court, but not afterwards, if said motion shall be overruled.

Said William F. Patrick shall pay all the costs and charges
54 of said receivership, including compensation of receiver, accruing after the execution and filing of supersedeas bond and regardless of how the appeal may result.

Said Patrick, during the pendency of said appeal, shall pay to the receiver at the end of every period of six months the amount of said costs, charges, and compensation accruing during said period of six months, and on his failure to make any of said payments when due and after thirty days' notice in writing from the receiver or from the appellee in this cause said receiver shall no longer retain possession of the property and money then in and thereafter coming into his possession, but shall immediately convey, deliver, and pay the same in accordance with the final decree of the circuit court and orders subsequent thereto.

If said Patrick shall withhold or cause to be withheld from the receiver any money payable to the receiver by the decrees and orders of the circuit court, then the matter shall be submitted to the said circuit court, and it shall find that said Patrick is in fault in said respect, and if said Patrick shall not, within twenty days, comply with the order of the court relating to that matter said receiver shall no longer retain possession of the property and money then in and thereafter coming into his hands, but shall immediately convey and deliver and pay the same in accordance with the final decree of the circuit court and orders subsequent thereto. If the decree of the circuit court shall be affirmed by the supreme court the money now in the hands of the receiver and that which may hereafter come into his hands shall bear interest at the rate of six per cent. per annum from the times respectively of the several payments of said money to the receiver after execution and filing of supersedeas bond and during the time said money remains in his hands by reason of said appeal and this agreement.

55 While this agreement is complied with by said Patrick the receiver shall keep said money invested in interest-bearing bonds of the United States or State of Missouri, as said receiver shall elect, and all interest so by him collected shall be allowed as a credit on the interest at the rate of six per cent., to be paid as aforesaid, if the decree of the circuit court shall be affirmed. If there should be a reversal of the final decree and an ultimate determination of the case in favor of defendant the money in the

hands of the receiver shall be disposed of by him as the circuit court shall direct.

March 19th, 1889.

F. J. BOWMAN &
D. P. SLATTERY,
By E. McGINNIS, *Their Solicitor.*
W. F. PATRICK,
By CUNNINGHAM & ELIOT,
His Att'ys.

And on the same day, to wit, on the twentieth day of March, A. D. 1889, there was filed in said cause an assignment of final decree in words and figures following, to wit:

(*Assignment of Final Decree.*)

"For value received I hereby assign and transfer to D. P. Slattery the final decree rendered in my favor in equity cause No. 2732, F. J. Bowman *vs.* Wm. F. Patrick, in the circuit court of the United States in and for the eastern division of the eastern district of Missouri, on March 19th, 1889. Witness my hand and seal.

FRANK J. BOWMAN. [SEAL.]"

And afterwards, to wit, on the twenty-fourth day of May, A. D. 1889, there was filed in said cause a stipulation in words and figures following, to wit:

(*Stipulation Extending Time to Give Supersedeas Bond.*)

56 In the United States Circuit Court for the Eastern Division of the Eastern District of Missouri.

FRANK J. BOWMAN, to the Use of DENNIS P. SLATTERY, Plaintiff,
vs.
WILLIAM F. PATRICK, Defendant. } No. 2730.

It is stipulated and agreed by the parties hereto that the defendant may file his bond for $85,000.00 to effect a supersedeas of the judgment and decree at any time before the 6th day of June, 1889, with like effect to supersede the decree and stay execution and all proceedings thereunder as if such bond were filed within sixty calendar days after the rendition of the decree; but this is upon the condition that the defendant informs E. McGinnis, Esq., solicitor for the complainant, of the names of the sureties to be offered on said bond before the expiration of May 28th.

May 24, '89.

E. McGINNIS,
Solicitor for Complainant.
CUNNINGHAM & ELIOT,
Solicitors for Defendant.

And afterwards, to wit, on the third day of June, A. D. 1889, the following further proceedings were had and appear of record in said cause, to wit:

(*Appeal Allowed; Bond Approved; Supersedeas Awarded.*)

F. J. BOWMAN, to Use of, &c., Complainant,
vs.
WILLIAM F. PATRICK, Defendant. } 2732.

Now comes the defendant by solicitor, on whose motion it is ordered that an appeal be allowed from the decree of this court to the Supreme Court of the United States upon the defend-
57 ant's giving bond in the penal sum of eighty-five thousand dollars ($85,000.00) in accordance with the stipulation filed herein on March 20th, 1889, fixing the amount of said bond.

And thereupon said defendant presents his bond in the penal sum of eighty-five thousand dollars, which is approved by the court and ordered to be filed and made part of the record herein.

And in accordance with a stipulation of parties filed May 24th, 1889, agreeing that a supersedeas bond might be given herein at any time prior to June 6th, 1889, and on motion it is ordered that a supersedeas be awarded staying further proceedings upon the decree in this cause, and that the clerk of this court make out and certify to the Supreme Court of the United States a full and complete transcript of the record and proceedings had in this cause in this court.

Said appeal bond is in words and figures following, to wit:

58 Know all men by these presents that we, William F. Patrick, as principal, and Eliza J. Patrick, William Patrick, American Surety Company of New York, as sureties, are held and firmly bound unto Frank J. Bowman, to the use of Dennis P. Slattery, in the full and just sum of eighty-five thousand dollars ($85,000.00) to be paid to the said Frank J. Bowman, to the use of Dennis P. Slattery, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-second (22nd) day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the March term, 1889, of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, in a suit depending in said court between Frank J. Bowman, to the use of Dennis P. Slattery, plaintiff, and William F. Patrick, defendant, a decree was rendered against the said William F. Patrick, and the said William F. Patrick having obtained an appeal of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Frank J. Bowman, to the use of Dennis P. Slattery, citing and admonishing him to be and appear

at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said William F. Patrick shall prosecute said appeal to effect, comply with said decree, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

WILLIAM F. PATRICK. [SEAL.]
ELIZA J. PATRICK. [SEAL.]
WILLIAM PATRICK. [SEAL.]
[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By CHAS. H. TURNER, *Vice-President.*

Attest: P. TAYLOR BRYAN, *Secretary.*

Attest signatures of William F. Patrick and William Patrick:
W. B. THOMPSON.
Witness to signature of Eliza J. P.:
F. W. TUPPER,
Dep. Clerk, U. S. Courts, Denver, Colorado, 5, 22, '89.

June 3rd, 1889.
Service of citation acknowledged & waived.
E. McGINNIS,
Sol. for Complainant.

Approved June 3rd, '89.
A. M. THAYER, *Dist. Judge.*

[Endorsed:] No. 2732. United States circuit court, eastern division of the eastern judicial district of Missouri. Frank J. Bowman, to the use of D. P. Slattery, *vs.* William F. Patrick *et al.* Bond, $85,000. W. F. Patrick, principal. Eliza J. Patrick, William Patrick, American Surety Co. of New York, sureties. Filed third day of June, 1889. A. P. Selby, clerk.

UNITED STATES OF AMERICA, }
District of Colorado. }

Personally appeared before me, a clerk of the district court of the United States for said district, Eliza J. Patrick, personally known to me to be the person who signed the foregoing instrument of writing, and acknowledged to me that she signed and sealed the same for the uses and purposes therein expressed.

Witness my hand and the seal of said court, at Denver,
[SEAL.] this 22nd day of May, A. D. 1889.

WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

59 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

FRANK J. BOWMAN
vs.
WILLIAM F. PATRICK. } No. 2732.

Opinion.

On motion to strike out certain exhibits.

SEPTEMBER 28, 1887.

MILLER, *J.* (orally):

This case was argued on Monday on the motion to strike out certain exhibits filed in the master's report of the testimony in the case. Those exhibits were letters written by one of the defendants to his wife, and the ground of the motion to suppress them is that they are such communications as are protected by the principle which the law throws around communications between husband and wife.

I confess I was very much astonished to find that there are some authorities which hold that while the wife cannot be permitted to tell, and not only that, but will be forbidden to tell what her husband says to her in any matter of marital or private relations, or while the private relations exists she will be forbidden to tell anything—will not be permitted to tell anything on the stand to the injury of her husband—I say I am surprised to find while that general principle prevails that there are some authorities holding that when this evidence can be got at either by obtaining possession of a letter or some method of overhearing communications by some third party between the husband and wife that thus evidence can be used.

60 We have examined these authorities and we are satisfied that as exceptions they don't include the present case. In the present case the report of the testimony shows concerning the party objecting to the use of these letters written to his wife that there was something like a separation between him and his wife, and proceedings for a divorce were instituted. Pending these proceedings the wife died, and the man who professed to be the executor or administrator of the wife's estate got hold of these letters, and without any requirement of his office as administrator, without any necessity for his using these letters in any way, he, in, I will not say malicious, but in a spirit of hostility to the husband, delivered the letters to the other side. Whatever exceptions there may be to the rule protecting communications between husband and wife which may exist, and in regard to which I don't propose to say anything further, I am quite clear that the wife has no right to publish these communications; that she would not be permitted to produce the letter if she was a witness on the stand; that she could be enjoined from producing the letter if she was supposed to be hostile to her husband, and that the executor in a voluntary and hostile spirit to the husband, who has letters, has no more right to produce them and deliver them over to the husband's prejudice than

the wife had. What might be the rule of law if this administrator had filed these letters in due course of administration for any useful purpose in a public office and they had been obtained or copied by a third party, or if they had got into the hands of the party who now seeks to use them in any appropriate and innocent manner, I am not prepared to say, but I do rule that under the circumstances in which these letters got into their hands they are not to be used as evidence.

61 I think I ought to say to the parties that while this decision precludes the use of these letters as evidence before this court, that if the action ever goes to the supreme court the letters, of course, will go accompanied with the motion to exclude them and the ruling of the court on that motion and all that will be before the supreme court on appeal, and if that court thinks the letters ought to be used in evidence they will be considered there, so that the matter is not of such extreme importance as might be supposed; but for the purpose of this trial in this court the letters will not be used. In regard to the other point that was raised that there is no evidence that the husband received one of these letters conveying information that looked like a fraudulent purpose, there is no reason why it should be admitted either, and they are all rejected. The clerk will make the order that all three of the letters are to be disregarded and stricken from the testimony.

62 In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

FRANK J. BOWMAN, Complainant,
vs.
WM. F. PATRICK and JAMES M. PATRICK, Defendants.

Opinion.

SEPTEMBER 17TH, 1888.

BREWER, *C. J.:*

This is an action brought by complainant to set aside a sale of his interest in certain mining property known as the Col. Sellers and Accident mines, situated near the town of Leadville, in the State of Colorado, and to compel the defendants to account for all moneys received by them as proceeds of the interest so sold.

The case is submitted on pleadings and proofs. The facts undisputed are these: In February, 1882, T. C. Stebbins and others owned the Col. Sellers and Accidents mining locations. In that month a contract was made between these owners on one side and the complainant and defendant Wm. F. Patrick on the other, by the terms of which contract complainant and Patrick were to sink a good and substantial shaft down to limestone in place or bed rock unless pay mineral was sooner found; also to make application for patent title to said mining claims, and in consideration thereof were to receive a deed to an undivided one-half of the property. A deed in pursuance of this contract was executed and placed in escrow. Complainant and his partner, Patrick, entered upon the performance of

this contract. The shaft was sunk, mineral was discovered, the deed placed in escrow was delivered, and the mine became a very profitable one. On October 19th, 1882, complainant conveyed to
63 said defendant, Patrick, his interest in the property, and this is the sale which is challenged. Complainant and defendant Patrick were partners in this contract, and the first question to be considered is the law which controls in sales by one partner to another.

The rule for the Federal courts is laid down in Brooks *vs.* Martin, 2 Wallace, 70. In that case the court, after noticing the fact that some authorities hold generally that the relation between partners is a fiduciary one and declining to express an opinion whether that rule is one of universal application, notices these features in that special partnership: First, that one partner was present and in the sole charge and management of the business, while the other was at a distance; secondly, that this was by arrangement between the partners and therefore that the managing partner was really an agent in charge. Upon such a state of facts, in case of a sale by the managing partner to the other, the court thus states the rule: "We lay down this as applicable to the case before us and to all others of like character that in order to sustain such a sale it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased, and, second, that all the information in the possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold should have been communicated by the former to the latter."

The supreme court of the State of Missouri, the State in which complainant resided, and the supreme court of Colorado, the State in which the defendant lived and where the property was situate, seem inclined to go even beyond the Supreme Court of the U. S. in asserting the fiduciary nature of the relations between partners. Pomeroy *vs.* Benton, 57 Missouri, 531; Caldwell *vs.* Davis, Colorado supreme court, 15 Pac. Rep., 696. In this case it is conceded
64 that complainant lived in St. Louis and was only once in Colorado between February and October: that said defendant, Patrick, lived in Leadville and had the active management of the business and this by arrangement between the partners, so that the case comes squarely under the rule laid down in Brooks *vs.* Martin. That rule must therefore be regarded as controlling in this case.

The second question is, When did complainant make the sale to defendant? Unquestionably the conveyance was not made until October 19th; but defendant insists that a binding contract of sale had been entered into theretofore, and that from the moment it was entered into the fiduciary obligations arising from the partnership ceased. Fortunately the negotiations of the partners leading up to the sale were in writing, so that we do not have to depend upon the uncertain memory of witnesses. On June 19th the parties met in St. Louis, the shaft having been sunk a hundred feet or more, and made a settlement. Patrick was indebted to complainant for

moneys paid out for him by complainant in some business transactions outside of this, which were allowed in this settlement, and a balance of $288.69 found due from the complainant to defendant on account of the moneys expended in sinking the shaft. For that sum complainant gave his note, due in three months. Up to this time nothing had been said in reference to a sale. Patrick returned to Colorado, and complainant started to spend the summer in the woods in the northern part of Wisconsin, his post-office address being Bayfield, Wisconsin.

On the 22nd of June Patrick wrote from Colorado to complainant a letter containing this proposition:

"In regard to your interest in the Col. Sellers, I think I know a man who will pay the note you gave me, $288.69, and take your interest off your hands and let me go right ahead with the
65 work, which I would very much like to do. If you are willing to let it go on these terms, which is the same proposition you made me in your office, please telegraph me immediately and I will try to make the arrangement."

On June 27 he wrote another letter, containing this language:

"I would like to have an answer in regard to the proposition I made you about the Col. Sellers, to return you your note and forfeit your share in the contract. There is a party here who will take it."

And on June 28th a third letter, containing this:

"Please let me know what we are to do in this new complication and also about the Col. Sellers, as I am anxious to continue work on that property and see what is there."

These letters were forwarded to complainant in Wisconsin. On the 13th of July complainant came out of the woods to Ashland, where was a telegraph station, and sent this telegram to Patrick:

"Yours of June 22d received yesterday. Proposition accepted. Send note."

On July 15th Patrick answered by this telegram:

"Acceptance too late. Proposition was dependent on immediate acceptance in St. Louis. See my letter of fifth."

On July 16th, from St. Paul, complainant wrote this letter:

"When I came out of the woods I found your letter of June 22d waiting my answer, and I telegraphed you on same day accepting your proposition to surrender to you all my remaining interest in the property adjoining the A. Y. on you surrendering my note; and on a perusal of your subsequent letters received here at St. Paul today I learn that is your wish. I do not complain of it. My judgment differs from yours as to the course to pursue, and I should not stand in your way and will not. If you wish any papers signed, send and I will sign them. My address is Bayfield, Wis."

66 According to his testimony he had received the letter of 22nd June at Ashland and the letters of the 27th and 28th after reaching St. Paul. On August 2nd defendant wrote complainant this letter:

"LEADVILLE, COLO., *Aug.* 2, 1882.

Mr. F. J. Bowman.

DEAR SIR: Yours of the 16th ult. received; in accordance with your request therein I send the within paper for your signature. I sold the note in St. Louis before getting your reply, so will have to wait until it matures, which will be Sept 19, ——."

The paper inclosed in the letters of August 2d is in full as follows:

Memoranda of agreement, made and entered into this — day of —— A. D. 1882, by and between Frank J. Bowman, of the city of St. Louis, State of Missouri, and William F. Patrick, of the city of Leadville, State of Colorado, witnesseth: That whereas, said above-named parties did, on the 17th day of February, A. D. 1882, enter into a certain contract in writing with Theodore C. Stebbins, Lyman Robison, Saml. J. Glover and Harvey Howard, by the terms of which written contract the said Bowman & Patrick, in consideration of the conveyance to them by said Stebbins and others, above named of the undivided one-half right, title and interest in and to the "Col. Sellers lode" and the Accident lode mining claims, agreed to sink a shaft upon one of said mining claims to pay mineral or limestone in place; and whereas, considerable work and development has been done and performed on said Col. Sellers lode, and the expense thereof -as been borne principally by said Patrick, and said Bowman is unwilling to continue said work or pay any of the costs thereof; and, whereas, on the 19th day of June, 1882, said Bowman executed and delivered to said Patrick his certain promis-
67 sory note of that date for the sum of two hundred and eighty-eight dollars and seventy cents, due 90 days after date, and bearing interest at the rate of eight per cent. per annum, which note was for said Bowman's proportionate share of the cost and expenses of working said Col. Sellers lode, and which had theretofore been paid by said Patrick; and whereas, said Patrick had negotiated and sold said note.

Now, therefore, it is hereby agreed by the parties hereto, that if said Patrick will pay said note when the same becomes due, and save the said Bowman from the payment of the same or any portion thereof, the said Bowman will release and surrender to said Patrick all his right, title and interest in and to the above-described contract so made with said Stebbins and others to the property described therein.

The said Bowman further agrees that on the payment of said note and the surrender of the same to him, to execute and deliver to said Patrick a good and sufficient deed of conveyance of his right, title and interest in and to the mining property described in said contract, and known as the "Col. Sellers" and "Accident" lode mining claims, situated in California mining district, Lake County Colorado, and the said Patrick agrees on his part to upon such conveyance to release said Bowman from any and all liability under said contract so made with said Stebbins, *et al.*, and to save said Bowman from all such liability.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

(SEAL.)
W. F. PATRICK. (SEAL.)

Witness as to Patrick:
E. A. REYNOLDS."

In reply and on Aug. 28th complainant sent this letter:

"CAMP NEAR BRULE RIVER, *Aug.* 28, 1882.

Mr. Wm. F. Patrick.

MY DEAR SIR: I send you the contract you desire, and trust this will settle our matters pleasantly and amicably. I have in-
68 serted a clause concerning your brother's interest, but he may not care to retain it. My address will be St. Paul until Sept. 10th, then I shall return to St. Louis and business.

Yours truly, FRANK J. BOWMAN.

P. S.—Mails are slow here.

"Memorandum of agreement made and entered into this — day of ——, A. D. 1882, by and between Frank J. Bowman, of the city of St. Louis, State of Missouri, and Wm. F. Patrick, of the city of Leadville, State of Colorado, witnesseth: That whereas said above-named parties did, on the 17th day of February A. D. 1882, enter into a certain contract in writing with Theodore C. Stebbins, Lyman Robison, Samuel J. Glover and Harvey Howard, by the terms of which written contract the said Bowman & Patrick, in consideration of the conveyance to them by said Stebbins and others above named, of the undivided one-half right, title and interest in and to the "Col. Sellers" lode and the "Accident" lode mining claims to pay mineral or limestone in place; and, whereas, considerable work and development has been done and performed on said "Col. Sellers" lode, and the expense thereof has been borne principally by said Patrick, and said Bowman has been and is unwilling to continue said work in such manner as said Patrick desires, or to pay any of the cost thereof if continued in such manner as said Patrick desires, or to pay any of the cost thereof if continued in such manner as said Patrick has directed; and, whereas, on the 19th day of June, 1882, said Bowman executed and delivered to said Patrick his certain promissory note of that date for the sum of two hundred and eighty-eight dollars and seventy cents, due ninety days after date, and bearing interest at the rate of eight per cent. per annum, which note was for the full amount of said Bowman's proportionate share of the
69 costs and expenses of working said "Col. Sellers" lode, which then remained due and unpaid, all previous amounts having been fully paid by him; and, whereas, said Patrick has negotiated and sold said note:

Now, therefore, it is hereby agreed by the parties hereto that said Patrick will pay said note when the same becomes due and payable and save the said Bowman from the payment of the same or any portion thereof, and in consideration thereof the said Bowman will

release and surrender to said Patrick all his remaining interest in and to the above-described contract, so made with said Stebbins and others, and to the property described therein (reserving and excepting for the use of the brother of said Patrick a one-sixth interest in said contract, if he shall elect to pay his assessments thereon).

The said Bowman further agrees that on the payment of said note and the surrender of the same to him, to execute and deliver to said Patrick a good and sufficient deed of conveyance of his right, title, and interest in and to the mining property described in said contract and known as the Col. Sellers and Accident lodes, mining claims situated in California mining district, Lake county, Colorado; and the said Patrick agrees on his part, upon such conveyance to him, to release said Bowman from any and all liability under said contract, so made with said Stebbins *et al.*, and to save said Bowman from any and all such liability.

Witness our hands and seals this 28th day of August, 1882.

FRANK J. BOWMAN.

These letters and telegrams are produced in evidence, their sending and receipt admitted. Beyond that defendant claims that on July 5th he wrote to complainant at St. Paul a letter of which this is a copy:

"LEADVILLE, *July* 5, 1882.

Mr. Frank J. Bowman, Merchants' hotel, St. Paul, Minn.:

70 DEAR SIR: I send you a statement on all amounts paid on the Col. Sellers contract since our settlement, from which you will see that the amount due from you thereon is $952.32 for which amount I will draw on you to-morrow. I wish to notify you and hereby do so, that if the draft is not paid, that I will apply to Stebbins and Robison and their partners for a new contract in my own name. I have consulted an attorney here, and am satisfied that we are obliged to continue the work in order to comply with our contract, and that your plan of doing a little work every ten days would not be acting according to its letter or spirit, and would cause a forfeiture of the contract and the loss of the amount we have spent in sinking the first 100 feet. The same attorney also tells me that under our contract, if you do not pay your proportion when called upon, you forfeit your rights under said contract. I want to deal fairly with you, and will tell you that in my opinion the shaft, which is now 165 feet deep, is looking very promising and I think we are not very far from the contract. My reasons for thinking so are that porphyry is now heavily iron-stained. Hope that you will pay the draft and that we may continue to work together, but if you do not I will have to protect myself, and will do so by taking the new contract as I have said.

I withdraw my offer to return your note for $288.70 dated June 19, 1882, in case you assign your interest in the contract to me.

Yours truly, W. F. PATRICK."

And at the same time he drew a draft for the amount named in the letter upon complainant at the Merchant's hotel, at St. Paul.

This draft was not paid and according to complainant's testimony was never presented to him, and it was sent by defendant
71 endorsed "without protest." This letter was not offered in evidence, and whether any such letter was received by complainant and whether the copy offered is a correct copy of the letter sent are both matters of dispute.

There confessedly were no other communications written or oral save one to be hereafter noticed between the parties until they met on October 19th, in St. Louis, when the deed was executed. Now, upon these facts it is clear that no binding contract was entered into between the parties until that time. The letters in June from defendant contain no proposition of his own, but simply communicate the proposition of another party, while on July 13th complainant telegraphed accepting; yet according to defendant's testimony, and he cannot now be heard to deny it, he had eight days before withdrawn the proposition, and two days after the telegram of July 13 he notifies complainant that his acceptance was too late. Of course he cannot now say that any contract was created by these communications. He himself had never made a proposition and the party for whom he assumed to act had withdrawn his offer. While it is true that on July 16 complainant by his letter indicated a willingness to sell upon the same terms, yet the letter and agreement sent by defendant on August 2 was no acceptance of complainant's proposition. The agreement as prepared did not purport to bind defendant, but only to bind complainant. It was an attempt on the part of defendant to obtain an option on the property. The contract provides that if defendant shall pay the note of complainant which had been theretofore negotiated by defendant and which did not become due until September 19th, then complainant should deed, but no binding obligation is assumed by defendant. If he should fail to pay the note the contract would become nugatory. Complainant, evidently unwilling to sign a contract which bound only one of the parties, on August 28th prepared a new contract bind-
72 ing both parties which he himself signed and forwarded.

Defendant never signed or accepted this, for although he now testifies that he considered the matter closed, yet no such unexpressed intention completes a contract. Up to Oct. 19 nothing had been done by which either party was bound. Complainant might have withdrawn the proposed agreement of August 28th and insisted upon retaining his share in the property because his proposition had not been accepted, and defendant could have compelled complainant to pay his share of the expenses thus far incurred, because nothing had been done to release complainant from his obligations. As I said before, unexpressed intentions to accept constitute no acceptance. It would be strange indeed if a party could avoid the obligations which spring from such confidential relations by saying that he intended to terminate them, for he was in a position, not bound by anything that had been done or said, to decline accepting if before the 19th of October the absolute worthlessness of the mine had been disclosed. Until defendant had bound himself

to purchase complainant had the right to rely upon him for full information, and the obligation of full disclosure remained until there was some binding contract between the parties. It is not pl'ff's offer to sell, but defendant's promise to buy, which cancels the obligations. While relation of partners continues their duties and obligations remain; but defendant insists that the obligations of partners are mutual, and that his obligation to disclose fully was released by complainant's failure to pay his share of the expense, and the case of McLure *vs.* Ripley, 2 Macnaghten, 274, is cited. Conceding the full authority of that case, I think it not in point. On June 19th the parties had settled, and complainant had made satisfactory arrangements for his share. He never received the draft of July 5th. The circumstances under which it was sent indicate that payment
73 was not expected, and it was sent simply for the purpose of crowding complainant out and getting a new contract in defendant's separate name, for in addition to what appears in the letter of July 5th there is also a letter of the same date written by defendant to his brother, in which this language is found:

"The shaft in the Col. Sellers is looking very promising. For several feet the prophyry has been heavily iron-stained, and I have good reasons for thinking we are near the contact. Acting on Col. Bissell's advice, I to-day wrote to Bowman, telling him that if he did not pay up, I would apply to the owners of the ground for a new contract in my own name and leave him out. I don't suppose he will pay, but I will let you into the new one on the same terms you are in the old."

Obviously defendant was then intending to get rid of his partner, and resorted to this strategy of sending a draft to one whom he knew to be absent on a hunting expedition, from whom he could not at the time reasonably and did not in fact expect payment, and whom possibly he thought the draft would not reach. Such strategy does not commend itself to the conscience of a chancel-or and does not relieve the party from the pressure of fiduciary obligations.

The third question is this: Did defendant prior to his purchase disclose all the information in his possession which was necessary to enable complainant to form a sound judgment of the value of what he sold? In respect to this matter also the testimony speaks with no uncertain sound. On the 31st of August a large body of ore was discovered. This was before defendant left Leadville and before he had received the contract of August 28th. He seems to have left immediately thereafter in search of complainant. It is true there was quite a flow of water at the same time, which pre-
74 vented further work in the mine, but of the discovery of the ore and that it was a large body of ore there can be no doubt, nor that the defendant was fully aware of it. As to the exact nature of the discoveries prior to that in the mine, the testimony is not altogether clear. There is testimony tending to show that about the middle of August a vein of mineral was discovered, and on Aug. 16th a contract was signed by defendant and the original owners of the mine in which it is recited that "a lode or

vein is now by all believed to have been struck," and which provided for the delivery of the deed theretofore placed in escrow as soon as the shaft should have been sunk to the depth of 250 feet, ten feet below the depth then reached. In fact the shaft was sunk to 265 feet and the deed delivered by August 31, so that long prior to the conveyance from complainant to defendant, prior to the time he received from complainant the contract of August 28th, the parties in Colorado had transferred the title, recognized full performance of the contract, and in fact it had been performed and mineral discovered. None of these facts were communicated to complainant. On the contrary, on September 2 defendant reached St. Louis and not finding complainant sent him this letter, the obvious intimation of which was against the completion of the contract, receipt of the deed, or the discovery of mineral:

"I reached here this morning and hoped to find you. I sent you from Leadville an agreement concerning the Col. Sellers, in which I agreed to pay that note, $288.70, and you relinquished all rights under the agreement. The shaft is still going down. The note will be due about Sept. 19, so please sign the agreement if you have not already done so, and send to me as soon as possible, so that I may arrange to take up the note. My address for two or three weeks will be Knoxville, Tennessee."

Beyond that, in the early part of August, indications of nearness of mineral were disclosed, and defendant admits that dur-
75 ing that month he cautioned his relatives not to disclose the information he had furnished them concerning the mine, for fear it might reach the complainant. As indicating the dates of these communications to his relatives and as tending to show the nature of the communications he made to them, a letter of Aug. 17, 1882, written by his mother to her son, and one of August 24th, written by his father to his son, were offered in evidence. They contain these statements:

"On last Tuesday Eddie and self went to K. to bring out Mrs. Dickinson. We stopped to see Annie, of course. Found Mrs. Hale feeling better but very weak. Annie was jubilant over a letter received the day before from Willie. He wrote her that they had found mineral in the Sellers (but conservative as ever) thought it was only a small pocket in the porphyry. While we were there the evening mail brought another letter from W. which E. carried over to A. in order that we might have the very latest news before going home. In this letter he said that a clearly defined mineral vein extended entirely across the shaft, and he was more than pleased with the outlook of the mine."

"Annie was up to see us on Tuesday; she just got a letter from Will.; he writes her the mine is all right. He is now going through a body of mineral that pays, and hopes to strike carbonates soon and has resolved not to sell, but hold on to the mine. You must not write anything to St. Louis about it, as William has not got Bowman's deed yet, only has a written promise for it. If you have written to any person caution them to say nothing about it."

Again, shortly after October 19th, the time he received his deed from complainant, although the flow of water since the last of August had been such as to prevent further developments of the mine, his brother made a bet that within a year the Patricks would
76 take from their interest in the mine more than $8,000 from sales of ore and wrote to the defendant in respect to the bet, who, on October 29th, replied that he had refused $3,000 for a one-sixteenth interest, and that there was no question but that, if they could get the water under control, he could take out $8,000 or $80,000 within the year.

I lay out of consideration the testimony given by complainant as to statements made to him on October 19th by James Patrick for the reason that such statements are denied by James Patrick, and the testimony of complainant is not altogether satisfactory. Putting this one side and resting solely upon that which is disclosed by the letters and contracts and the undisputed testimony of parties in no way interested, there can be no doubt that many, many facts affecting the value of the property were known to defendant long before his purchase from complainant and some time before he received the contract of August 28th, which he did not disclose to complainant. The case comes clearly within the rule of Brooks *vs.* Martin, *supra.*

But it is further insisted by defendant that the claim is stale; that these transactions were in 1882, while this suit was not commenced until 1886; that in 1883 it became generally known that large bodies of ore were being taken out of the mine, and therefore complainant should have commenced this action earlier. It is enough to say in reply that there is not a syllable of testimony tending to show that complainant knew of the fraud practiced upon him until just before the commencement of this suit, and then only through some family trouble of the Patricks, in consequence of which certain letters were brought to his knowledge. He himself positively testifies that he had no suspicion of anything wrong. I do not understand that the mere fact that property which has been sold for a small sum a few months thereafter is found to be of exceeding value creates any suspicion of bad faith on the part of the purchaser
77 or casts any duty upon the seller to institute immediate inquiries to see if he has not been defrauded; on the contrary, he who acts in good faith generally presumes that the party with whom he has been dealing has acted in like good faith, and may safely rest upon that presumption until facts are called to his attention which indicate the contrary.

I think that that is about all I need to say. My conclusions rest but slightly upon the testimony of the complainant, but are reached almost entirely from the testimony of defendant and those written matters of letter and contract which suffer nothing from failure of memory, but speak with the same language so long as they endure. My conclusion is that the sale made in October, 1882, cannot be sustained; that the complainant is entitled to a decree setting aside that sale, declaring him the owner of five forty-eighths of the property, and ordering a conveyance thereof by defendant and an ac-

counting. I see no reason for any decree as to James Patrick, and the bill as to him will be dismissed.

78 The deposition of Joseph C. Whiting, a witness of lawful age, produced, duly cautioned, sworn, and examined by and before me, Robert H. Buck, in response to the interrogatories and cross-interrogatories and pursuant to the commission hereunto attached, commanding me to take the testimony of said witness, to be used in a cause now pending in the circuit court of the United States within and for the eastern district of Missouri, wherein Frank J. Bowman is plaintiff and William F. Patrick *et al.* are defendants, on the part of said plaintiff.

On this 12th day of May, A. D. 1887, at the hour of ten o'clock in the forenoon, at my office, in Leadville, Colorado, I was attended by the said witness, Whiting, whereupon the said witness, being by me first duly cautioned and sworn, did depose and say as follows in response to the interrogatories to him propounded:

Direct interrogatories propounded to J. C. WHITING:

1st. What is your name, age, residence, and occupation?

Answer. Joseph C. Whiting; age, forty-six years; residence, St. Louis, Missouri, and occupation at present, manager of the Colonel Sellers mine.

2d. Are you now or were you ever a part owner of the "Col. Sellers" & "Accident" silver mines in California mining district, Lake county, Colorado? If yea, state when you first became an owner in each of them and whether your ownership has been continuous and to what time.

Answer. I do not now own any interest in either the Col. Sellers or Accident mines, all my interest having been transferred to my wife early in the year 1886. I bought into the Col. Sellers and Accident mines some time in July, 1882. The interest which I then acquired was obtained from T. C. Stebbins to the amount of one-six-
79 teenth in each claim. Somewhat later, either in August succeeding or early in September, I acquired jointly with A. J. Gerhard, of St. Louis, one thirty-second interest in the Col. Sellers claim only. Soon after acquiring the one-sixteenth interest from Mr. Stebbins I offered to let Mr. Gerhard in with me on the purchase. The offer was accepted, and I made a transfer of a one thirty-second interest in both the Col. Sellers and Accident claims to Mr. Gerhard. Some time in February, 1883, I sold one sixty-fourth interest in the Col. Sellers and Accident claim to John J. Simmons, of Chicago, but my transfer was made through Wm. F. Patrick, who sold a portion of his interest to him at the same time, and from the date of that transfer down to February, I think, of 1886, I was the owner of record of one thirty-second interest in the Col. Sellers claim and one sixty-fourth interest in the Accident claim. I left Leadville, as I supposed, for good, in November, 1885, and at a subsequent date, which I think was in February, 1886, I

made a present of my interest in the Col. Sellers and Accident claims to my wife, Katie L. Whiting, who still retains it.

3d. Do you know how many dividends in all have been paid by said mines, and total amount of dividends, and the amount of each dividend, and the date when the same was declared and paid? If yea, state the number of dividends paid, the total amount of all, the amount of each dividend, and the date when same was declared and paid; and if for any reason you fail to answer the foregoing fully and accurately, then state the total amount of dividends received by yourself and Katie L. Whiting, and the amount of each, and the date when declared and paid, and the interest in said mines owned by you and said Katie L. Whiting at the time each dividend was declared and paid.

Answer. In answering that question I would prefer that I be permitted to refer to the books of the company that my information may be accurately given. The books are complete and the dividends are accurately set forth, the dates at which they were paid, the names of the recipients given, and having been disconnected with the mines for nearly a year, or between November, 1885, and September, 1886, and not having had an opportunity to refer to that record of the mines (nearly a year's), I would like to have permission to examine the books and refer to them rather than rely on my memory. I can gather all this information and classify everything required by this question and the succeeding questions in four or five days, and possibly sooner. I am in active charge of the mines, and my time is very limited. The duties of one day are crowding upon another, and I shall have to put in my nights in order to procure the information with accuracy.

80

Whereupon the witness, Whiting, was requested to be prepared and appear to-morrow, May 13th, A. D. 1887, at ten o'clock, to which time the further taking of testimony was adjourned.

FRIDAY, *May 13th, A. D.* 1887, at ten o'clock a. m.

Witness WHITING resumed:

I have not been able to make preparation to give further answers.

Whereupon the further taking of testimony herein is adjourned until Saturday, the 14th day of May, A. D. 1887, at ten o'clock a. m.

SATURDAY, *May 14th, A. D.* 1887, at ten o'clock a. m.

Witness WHITING resumed:

Since the adjournment yesterday morning I have given all my leisure time to the compilation of facts in relation to the case in hand, but have been delayed somewhat from the fact that the abstract of title of the Col. Sellers and Accident claims could not be found in the office safe. I am informed that they are in the office of our attorneys, and, upon my request, they were to make search for them and deliver them this morning,

81

but they have not yet been able to find them. Annual statements of the business of the Col. Sellers mine have been regularly made and office copies I supposed was getaatable, but in some recent negotiations I find that I have distributed them all outside to parties in interest, and facts which were easily to be obtained from said statements have all to be collated again, and I also find that it is going to take me some time to do this, and I am not thoroughly prepared yet to go further in this examination. The abstracts mentioned have been in possession of Mr. Parsons, attorney of the mine, for some time (as it is frequently necessary for him to refer to them), and his partner, Mr. Lyles, has not yet been able to produce them. Mr. Parsons will no doubt be able to produce them upon his return to night or to-morrow morning, so that I can testify more fully on Monday.

Whereupon the taking of testimony was adjourned to May 16th, A. D. 1887, at ten o'clock a. m.

MAY 16TH, A. D. 1887, at ten o'clock a. m.

Witness WHITING resumed:

(The 3d interrogatory being propounded to the witness, he replied as follows:)

Since my last appearance I have been busy examining the records and books of the Col. Sellers and Accident mines and have not yet completed the arrangement of facts and figures demanded by this and succeeding questions, but I am able to state now that
the total amount of dividends paid to May 1st, 1887, is
82 $416,465.87. The last dividend was paid on the 3d day of
August, 1886. Now, as to the amount of each dividend, the dates of their distribution, and the other facts called for, I shall be able to give testimony in full by to-morrow and be prepared to go through the whole business.

Whereupon the taking of testimony was adjourned to May 17th, A. D. 1887, at ten o'clock a. m.

MAY 17TH, A. D. 1887, at ten o'clock a. m.

The witness Whiting not being present at ten o'clock a. m., the taking of testimony was adjourned until two o'clock p. m.

At two o'clock p. m. of May 17th, A. D. 1887, witness WHITING resumed:

The total number of dividends paid by the Col. Sellers mine is thirty. I have already stated the total amount, which has been distributed as follows: July 5th, 1883, $10,066.37. This was an irregular dividend. The amount received by each party was: J. J. Simmons, $1,329.60; J. C. Whiting, $972.05; T. C. Stebbins, $689.70; Lyman Robison, $2,610.40; William F. Patrick, $3,977.35; John Livezey, Jr., $487.27, and these amounts represent, not a division *pro rata* on the interests held by the parties at that time, but the amounts which had been contributed by the parties in the way of opening and developing the mines up to July 5th, 1883. It was agreed

among all the owners of record that after a sufficient amount of ore had been set off to cover every debt then owned by the different parties under the general name of the Col. Sellers mine that each should draw down the amount of his cash contribution.

The second dividend was August 15th, 1883, and was for $3,200.00.

	Dividend No. 3, September 3d, 1883	$6,400 00
83	Dividend No. 4, September 12th, 1883	$1,800 00
	" " 5, October 18th, 1883	14,400 00
Dividend No.	6, November 28th, 1883	8,000 00
" "	7, December 21st, 1883	12,800 00
" "	8, January 30th, 1884	18,000 00
" "	9, February 21st, 1884	36,000 00
	Which was the largest dividend ever declared.	
" "	10, March 28th, 1884	16,000 00
" "	11, June 30th, 1884	8,000 00
" "	12, July 31st, 1884	20,000 00
" "	13, August 25th, 1884	10,000 00
" "	14, October 4th, 1884	22,000 00
" "	15, November 1st, 1884	8,000 00
" "	16, November 29th, 1884	16,000 00
" "	17, February 25th, 1885	12,000 00
" "	18, April 16th, 1885	8,000 00
" "	19, April 28th, 1885	7,200 00
" "	20, May 29th, 1885	9,999 50
	This odd number comes from drawing a check to Mr. Gerhard fifty cents short.	
" "	21, July 3d, 1885	12,800 00
" "	22, Aug. 11th, 12th, and 13th	11,500 00
" "	23, Sept. 3d, 4th, and 5th, distributed	12,800 00
" "	24, October 13th and October 24th	12,800 00
	An advance of $100.00 having been made on account of dividends to John Livezey, Jr., on the first date.	
" "	25, November 30th	10,000 00
" "	26, December 26th and 28th	16,000 00
" "	27, January 21st to the 30th, 1886	32,000 00
" "	28, March 4th, 1886	30,000 00
" "	29, April 2d, 1886	16,000 00
" "	30, August 2d, 1886	8,000 00

4th. Do you know whether any part of the dividends from said mines was paid to the defendants, William F. Patrick &
84 James M. Patrick, or either of them? If yea, state the total amount paid to each & the amount and date of each payment made from said dividends to said Wm. F. & James Patrick & to each of them.

Answer. Mr. James M. Patrick, so far as I know, has never been a recipient of any dividend directly from the Col. Sellers mine. He does not appear to be an owner of record, and whatever his connec-

tion with the mine is I do not know anything about it of my own knowledge. I never met the man but three or four times and never saw him in the office of the Col. Sellers mine until the bringing of this suit.

Mr. William F. Patrick has received thirty dividends of date as heretofore given, and the amounts run as follows:

No. 1	$3,977 35
No. 2	1,250 00
No. 3	2,500 00
No. 4	4,687 50
and	1,562 50
No. 5	5,625 00
No. 6	3,125 00
No. 7	5,000 00
No. 8	7,031 25
No. 9	14,062 50
No. 10	6,250 00
No. 11	3,125 00
No. 12	7,812 50
No. 13	3,906 25
No. 14	8,593 75
No. 15	3,125 00
No. 16	3,125 00
No. 17	4,687 50
No. 18	3,125 00
No. 19	2,812 50
No. 20	3,906 25
No. 21	5,000 00
No. 22	4,687 50
No. 23	5,000 00
No. 24	5,000 00
No. 25	400 00
	400 00
	3,106 25

three amounts taken from the dividend column of the cash book, and I give these amounts because they may be in excess of the *pro rata* of twenty-five sixty-fourths of the whole, which is Mr.
85 Patrick's share, and without going into figures to see whether thay are *pro rata* figures or not I would state that there are several of the entries in the said dividend column which represent money drawn by Mr. Patrick on account of advances made on account of dividends of some one or more of the owners in advance of the date of their declaration. When the dividend was declared the amount of his advance, for which he had taken the precaution to take an order, was stopped and the books do not always show on whose account, although they do pretty generally; but in transcribing figures for this testimony I have not in every case set down to whose account the money is properly chargeable on dividend account.

No. 26	$6,250 00
No. 27	12,500 00
No. 28	11,718 75
No. 29	6,250 00
No. 30	3,125 00

How these dividends were further distributed never came to the knowledge of the owners of the Col. Sellers mine. If there was any further distribution, it is a matter with which we never concerned ourselves. As to the further distributions, I refer to the dividends of W. F. Patrick.

5th. Do you know whether any money derived from the product of said mines was expended in paying for shaft-houses, machinery, pumps, ore crushers, ore concentrators, and other appliances and things (exclusive of labor) used in and about said mines in developing & operating same? If yea, state how much money was expended, when, and for what, and was the property so purchased still on the premises.

Answer. With the exception of that part of $10,066.36 which was the amount of the cash contribution of the owners of the Col. Sellers mine toward opening, developing, and putting improvements
86 upon the mine, all the improvements on the mine, whether on the surface or beneath it, have been paid for out of the ore product of the mine, and, with the exception of such changes as have been necessary during the time the mine has been in operation, all the improvements are still on the mine. The books of the mine show that in 1883 there was spent for improvements, in which I include machinery, lumber, contracts on shaft-house for the building of the same, etc., $23,653.03. The annual statement of 1884 shows that there was spent in improvements during that year $27,638.51. In 1885 the improvements cost $34,246.80. During this year we put up our concentrating mill, and it was mostly paid for in December of that year, and I wish to state that in 1883 we spent on the Accident claim—an undeveloped fractional claim adjoining the Col. Sellers claim—for the sinking of a shaft thereon $5,150.07, and that in 1884 in carrying down the same shaft to mineral we spent the sum of $5,335.51. In 1886 we spent for improvements $20,121.72, and the total amount of improvements up to January 1st, 1886, exclusive of the cost of the Accident shaft, was $105,650.06, and in this connection I might state that the main working shaft of the Col. Sellers mine, called No. 2, was really paid for in the year 1883 out of the proceeds of the mine by a settlement made in July of that year with the parties who sunk the shaft, but the cost of the same appears under the head of "legal expenses" in the cash book, an amount having been paid to divers claimants of about $4,900.00, and the No. 4 shaft of the Col. Sellers claim, the original cost of which was in the neighborhood of $16,000.00 (it was sunk by lessees), cost the company the further sum of somewhat over $1,100.00, that amount having been given to the lessees by the relinquishment to them of royalty by the company—royalty on ore shipped by said lessees—in consideration

of their turning over all improvements which they had made
87 to the Col. Sellers owners and in the way of effecting a compromise and final settlement.

6th. Are you connected with the present management of said mines; if yea, in what capacity & how long have you been so connected?

Answer. I am at present general manager of the Col. Sellers mines. At the request of the owners I took my position as such about the 1st of September, 1886. I was here in the latter days of August and assumed the management soon after.

7th. Were you in any way connected with or employed in or about said mines prior to being manager thereof? If yea, state when you first became so connected or employed & in what capacity & how long you continued in all connections & employments in & about said mines prior to your becoming manager thereof.

Answer. I was. I have been active in the Col. Sellers mine affairs ever since I became an owner in the mine. During the first months of my connection with the mine and down to the time when we reached something like an organization—say at the commencement of the payment of dividends in July, 1883—I was on the ground to look after my own interests and to do what I could to help along the general interests. We took an office about July, 1883, and so established something like a headquarters, which we hadn't before, and, from doing our business on the streets and at private residences or as we met casually, we settled down to something like a regular order of things. Those were pretty crucial times in our history and we were all of us pretty busy. I did my share of the work. Each of us gave attention to what happened to be most in hand or seemed most pressing. After July, 1883, it was agreed that the management of the mine should rest with Mr. William F. Patrick; in fact, there had been an
agreement before that that if he would serve without
88 pay there would be no objection to his taking the general supervision. After that time, and for how long a time I cannot say, I had no regular employment, drew no salary, but, as near as I can recollect, I put in about two years without any compensation, except that I was paid a very small amount for services rendered in collecting the scattered accounts of the eleven months' business—from August, 1882, to July, 1883—and putting them in such a shape that we could make them a basis of our first settlement. Some time in 1884 I began to draw a salary for looking after the shipments, settlements, etc. I rendered all the assistance I could to the manager of the mine, Mr. Patrick, and tried to fill the bill of a man who was never in the way and never out of the way. I left Leadville in November, 1885, and was gone until the last of August, 1886; and, as I have said, about the 1st of September, 1886, the management of the property was given over to me, and I have been in charge since.

8th. Are you acquainted with the value of said mines now and their value on Oct. 15th, 1886? If yea, state what, in your opinion, was their value on Oct. 15th, 1886, & what is their value now.

Answer. The question of value is difficult to determine. Mine values are very uncertain. A mine in Bonanza is rated high; in Borasco is rated low. On October 15th, 1886, the mine was in debt several thousand dollars. It has paid no dividend since, and there is a judgment hanging over the mine, drawing ten per cent. interest, of $20,690.00—against the mine and in favor of the Minnie mine, its neighbor—rendered in May, I think, of last year, which judgment has been appealed from to the Supreme Court of the United States and is pending there now. What the mine has done is no criterion to go by to fix its value, and what the mine
89 can do I would hesitate to say. I know the Col. Sellers mine as well as any one. I have seen it in all its phases, and like every other big mine it has been in turn rich and poor in grade. I feel that so long as this litigation and other litigation hanging over the mine is pending it is without value, excepting in what dividends may be declared. It cannot be sold or stocked and sold, and except for dividends it is of no account to the owners. By other litigation I mean the suit now pending in the United States court in Denver, inolving the title, if I remember right, to one-fourth and one-sixteenth of the Accident claim. My interest in that claim was but one sixty-fourth, and I refused to make it larger, because when negotiating for the purchase of an interest, then held in Ohio (in 1882), I felt that this very suit which is now pending would likely come up, and I declined to buy into any further litigation, as we had plenty on hand already. So far as the Accident claim is concerned, it is in debt to the Col. Sellers mine. It has never paid the cost of opening it, and it is doubtful if it ever does. All the improvements in use to-day or of service to the owners of the two claims are upon the Col. Sellers ground and were paid for out of Col. Sellers product.

9th. Do you know whether any ore from said mines has been mined, but not yet sold or disposed of? If yea, state where that ore is and how many tons of it there are, to the best of your knowledge and belief.

Answer. I do not understand the purport of this question. It discovers ignorance on the part of the questioner. When ore is mined it is at once disposed of, and as a matter of fact the mine contracts have disposed of unmined ore to the extent of eleven hundred tons per month; the output is sold ahead. If the question is intended to be how much ore is exposed in the mine, I must
90 simply say I cannot tell. Ores are sold under contract. The contract may specify that the mine will deliver its output for six months, be it more or less. Our contracts are made with several parties. One party has contracted to pay at a certain rate for our concentrates, the rate varying with the classes, of which we have three—first, second, and third—and that same party also has a contract for four hundred tons a month of crude ore, and a second party has a contract for three hundred tons, with a specification that we will deliver him four hundred tons if we can, and a third smelter has a contract for four hundred tons a month. All the contracts run six months from the 1st of February of this year. There is no ore

mined that has not been disposed of, but there is considerable ore disposed of under contract that has not been mined.

10th. Are you acquainted with the character and value of said ore? If yea, state its character & what in your opinion is the value of all the said ore mined, but not yet sold or disposed of.

Answer. I am perfectly well acquainted with the character of the ore in the Col. Sellers mine. The character of the ore is a sulphide of iron, lead, and zinc, carrying silver. It is valuable in proportion to the amount of lead it contains and its silver contents, and the value of the ore is also materially affected by the percentage of zinc which the ore carries. It is a very difficult ore to handle, both for the miner and the smelter. I calculate that the presence of zinc in the ores which the Col. Sellers has sold to date—something like fifty-six thousand tons—has cost the mine over a half million dollars. If the percentage of zinc is low and the lead high and the silver a fair average—say twenty ounces—it is an ore that can be sold at a small profit. If the zinc is excessive and the silver the same fair aver-
age—say twenty ounces—and the lead low it is an ore
91 that can only be concentrated, and its only value consists in so far as its lead contents, iron and silver contents, can be concentrated. The zinc has to be eliminated in the concentrating process. The ore changes greatly in its value and very rapidly at times, and a constant watch has to be kept upon shipments to insure a remunerative return, and careful sorting is very essential. When I first took charge, in September last, the first thing that presented itself to me was a claim of one of the smelters for several hundred dollars on a lot of ore that would not pay treatment charges and freight. The superintendent of the mine, under myself, every day samples every breast of ore upon which work is being done, and we endeavor in this way to gather information necessary for the proper shipment of the ore, but nobody can tell by looking at the ore or upon its great masses in the mine what its value is or what the outcome of its shipment will be. This has to be determined from day to day and as each lot is shipped. We are often disappointed at a low return, and we are sometimes pleasantly surprised. Take the product, for instance, of the mill, first-class concentrates, which is ordinarily above forty per cent. in lead, and the silver in them will vary in the ton on that percentage of lead from sixteen ounces to one hundred and fifty ounces. The zinc, which we eliminate by the concentrating process, seems to carry as much value in silver as the lead. It was confidently predicted when we undertook to manage the difficult problem of concentrating our peculiar ores that we would fail in the attempt. While we have made a fair financial success of our milling operations, we are still not saving over thirty-three and a third per cent. of the silver in the ore which is fed to the mill.

Now, as to the number of tons of ore mined since the 16th
92 day of October, I will say that I have not had time to segregate my figures so as to begin with precisely that date, but I submit a statement of the shipments of ore from the Col. Sellers mine as they appear on the books of the company, where every

smelter return is transcribed on the debtor side of the account, giving the gross weight, the moisture per cent., the moisture pounds, the net weight resultant upon which values are founded, the silver assays as determined between the smelters and ourselves, or, in case of our disagreement, by an umpire; the New York price of silver on the day of settlement, which is always the contract price; the number of ounces of silver in each lot, the percentage of lead as determined by the parties in interest, the number of pounds of lead and the price of lead under the contract under which the lots have been sold, the working charge for smelting, the net result per ton in dollars and cents, and the gross amount as shown by the statements, a copy of which, from No. 1 to the last lot settled for, is on file in the office. I submit this statement to include September, October, November, December of 1886, and January, February, March, and April of 1887, and the shipments to date in May; and they appear as follows:

In September, 1886, we shipped 395.14 tons, divided as follows: Crude ore, 216.485 tons; No. 1 jig, 50.335 tons; the concentrates—put down on the books as No. 4 (a product which I am not now producing and which was turned out by our original experimental mill)—106.195 tons; third-class concentrates or slimes, product saved in tanks (settlings), 22.145 tons.

In October we shipped 779.54 tons, as follows: Crude ore, 501.83; first jigs, 114.815 tons; second jigs, which is second-class product, 114.92 tons; slimes, 47.995 tons.

In November our shipments were 1,340.35 tons; crude ore, 757 tons; first jigs, 173.13; second jigs, 296.89; slimes, 133.33.

93 In December the amount shipped was 1,233.455 tons; 896.13 tons crude ore; first jigs, 84.255; second jigs, 222.07 tons, and 31 tons slimes.

In January, 1887, our concentrating mill was shut down for very needed repairs. We shipped in that month 1,261.355 tons of crude ore.

In February, 1887, we shipped 1,213.305 tons, of which 470.175 tons was ore entered as iron, not sold under our ore contracts, but under a special arrangement which demanded a special quality to insure a special price, and of which I might say less than 100 tons was shipped at a profit. Of second jigs we shipped, same month, 74.785 tons; slimes, 20.82 tons; crude ore, 647.425 tons.

In March we shipped 1,141.45 tons; crude ore, 572.95; slimes, 33.395; first jigs, 160.735; second jigs, 264.14; iron, 98.27; and the books show that I sent 12.265 tons of tailings to Denver for experimental purposes.

In April we shipped 1,042.57 tons; first-class crude ore, 747.655; first jigs, 91.47; second jigs, 185.525; slimes, 17.72.

Now this month (May) we have shipped, lot 614, crude ore, 199,130 pounds; lot 615, slimes, 33,230 pounds; lot 616, first jigs, 153,270 pounds; lot 617, second jigs, 172,970 pounds; lot 618, first-class crude ore, 278,160 pounds; lot 619, first-class crude ore, is now being loaded for the Pueblo Smelting and Refining Co., so that the tonnage this month, as far as determined, amounts, all told, to 418.36 tons.

That this statement may be better understood, and the general method of transacting the ore business of the mine, I will say that we have received cash in settlement for all ore down to lot 614, which opened up our May account. All the May shipments are still outstanding accounts, the values of which are yet to be determined in the
94 usual manner by crushing, quartering, sampling, and assaying, by comparison of assays, and in failure to agree between ourselves, then upon the decision of an umpire, of which we have at present, under recent arrangement, a choice of four assayers.

11th. Do you know whether any money is owing from any person, firm, or corporation to the owners of said mines for ore from said mines? If yea, how much, from whom, & when was said ore sold?

Answer. I partly answered this question in my answer to the last question, No. 10. We aim to determine as nearly as possible the value of ore shipments as the lots are made up in our bins. A sample from each bucket as drawn from the mine is taken out, and samples are taken in this way of the ore hoisted both by day and night. A record is kept of this in the upper office—that is, in the office at the mine and not at the town office—and such a record has been kept ever since shipments were begun; but, of course, this way of determining values is rather crude, and no smelter would be willing to buy our ore on an average determined by our own assayer. The whole lot is crushed and turned over, quartered and sampled by them, and their determination of the values is likely to be more accurate than ours, although we are not ordinarily far off. Now, all the ore that I know of or all the money that I know of due from any person or corporation to the owners of the Col. Sellers mine for ore from said mine is compromised in shipments from lots 614 to 618, inclusive. Our ores since February have been gone to four different parties: The Arkansas Valley Smelting Co. of Leadville has a contract for four hundred tons per month for six months from February. The Omaha & Grant works of Denver has a contract for 300 tons, and 400 tons, if we can spare that amount or give it per month from same date, of crude ore. The Pueblo
95 Smelting and Refining Co. of Pueblo has a contract for 400 tons crude ore per month and for all the output of the concentrating mill for six months from February first. Then we are delivering to the Colorado Smelting Co. of Pueblo an occassional lot of ore under a contract which they claim is still in existence, which was made in January, 1884, and originally called for 12,000 tons, somewhat over 8,000 tons of which have been delivered. All of our ore contracts from the date of our commencing business to the present time are on file in the down-town office of the company.

12th. Do you know whether there is any money on hand from the sales of ore? If yea, state how much and where it is.

Answer. I have not brought forward my balance on the check book since the date of my last balance of the bank book, the 1st of May. At that date we had $3,713.17 in the Carbonate bank in Leadville. We have since deposited and also paid out, I should say,

about $12,000.00, and our bank balance to-day (I meant to inquire and forgot to do so) is in the neighborhood of $4,500.00. Then there is a very small amount of money—less than $1,000.00, I think—in the German National Bank of Denver, the tail end of an account we once carried there and denominated the "dividend reserve."

13th. Do you know whether the said mines have been operated from Oct. 15th, 1886, to date? If yea, state how many miners have been employed and how many tons of ore have been mined in that time.

Answer. The mine has been in steady operation since I took charge the 1st of September, 1886. The number of miners varies almost from day to day, and the only information I can give in answer to this question is this: That I find in September the number of names on the pay-roll was 109; in October, 96; in Novem-
96 ber, 93; in December, 108 (all of the year 1886); in January of this year, 98; in February, 103; in March, 100; in April, 90. The May pay-roll will not be in until the first of next month, but there is about the same number of men employed this month as last. Now, this number of men does not represent the number of men constantly employed, but represents the number of men that during the month have for one day, six days, or thirty days, or for a varying time, been entered on the time book and have gotten their names on the pay-roll. The number of men from one month's end to the other, giving a full day's time to each man, would probably be about 80; but this question asks, "How many miners have been employed?" Now, the number of miners employed bears a small proportion to the total number of men whose names are on the pay-roll. We have not kept a separate account of men employed absolutely in mining, but the numbers given include all the engineers, firemen, men in the concentrating mill, chief engineer, carpenters, saw-mill men, trammers, timbermen, roustabouts, etc. The number of men actually mining—that is, breaking ore—is probably not over ten to-day, for both night and day.

14th. Do you know whether any ore from said mines has been sold since Oct. 15th, 1886? If yea, state the number of tons, to whom sold, date of sale, selling price, and amount of money received.

Answer. I have already stated that all the ore has been sold under contract since October 15th, 1886, and I have given the number of tons. I neglected to put my figures into such shape as to show how much each smelter had received. However, all that is set forth on the debtor side of our cash book and can be easily ascertained. The amount of money received is as follows: I wish to state that from the time of my taking charge of the
97 mine, the 1st of September, until the first of February, I was without any assistance in the office of any kind whatever. At the time of my taking charge there were a great many difficulties presented to the management. Feeling ran very high against the mine and there was dissension in its forces which extended even to the men laboring on the premises. New men re-

cently employed were cursing the older hands; old foremen found it necessary to have street fights with new foremen; the clerk who had been in the office I found it necessary to discharge, as I had to neglect the mere transcription of accounts for some little time. The accounts of the mine are kept in a very simple way, but in a very accurate way. All transactions represent either cash in or cash out. One side of the cash book is a mere transcript of the ore returns and a column of miscellany, which includes receipts of money from other sources than ore returns, some small rentals being the main item; and the other side of the cash book, the credit side, is ruled off in ledger headings, and simply represents the transcript of the stubs of the check book. The amounts are carried out under their proper headings, and the totals, the receipts and disbursements, show the one side, the debtor side, the amount of money received; the other, the credit side, the amount of money disbursed; and the difference between them is the cash balance as shown by the check book and the bank-deposit book. These are the only three books we use. Now, when I took charge the August accounts were not entered up. When I got that done finally I ran August and September together and I find that in August and September the receipts were $29,754.56, and that I disbursed—or the parties who had charge and preceded me and myself—had disbursed in the two months an amount in excess of this of $2,483.62. In October the receipts were $13,162.94 and the disbursements $2,418.36
98 in excess of this. In November and December the receipts were $32,842.32, and we were overdrawn on the 1st of January, 1887, $358.24, but as I had given a note to the bank of $4,500.00 we were really behind $4,858.24, which amount is about the amount that was overdrawn to make the last dividend of August 3d. In January and February the receipts were $23,006.95; in March, $31,122.25; in April, $14,415.59, making the total receipts from August 1st to May 1st $144,344.61, and the disbursements were $140,591.44, leaving a balance in bank of $3,713.17; and I will say that beside the $4,500.00 bills payable of December, 1886, I made another B. P. of $10,000.00 in January of this year to tide me over while I made the necessary repairs on the concentrating mill, the stoppage of which I knew would make a deficit in my receipts of about that amount. Now a balance of $3,713.17 remains, with the $14,500.00 borrowed from the Carbonate bank liquidated. We have, as near as I can estimate, due us for ore shipped but not settled $7,000.00, with not to exceed $1,000.00 unpaid accounts not yet due on our files.

15th. Do you know the total amount in money of receipts from & total amount of disbursements on account of said mines from Feb'y 17th, 1882, to date? If yea, state total amount of receipts and total amount of disbursements.

Answer. The owners of the Col. Sellers mine have nothing to do and never did have anything to do with any of the expenses of the Col. Sellers mine as far back as February 17th, 1882. Whatever expense was put upon the mine or the prospect which was developed into the Col. Sellers mine from the date of February 17th, 1882, to

the date of the contract between the owners of the Col. Sellers mine, some time in August, 1883, has never been any part
99 of our business. Such expenses were incurred by W. F. Patrick and whoever was interested with him under his contract to sink a shaft to pay mineral on the Col. Sellers claim. Our fiscal date was made when, under joint agreement between William F. Patrick, J. J. Simmons, J. C. Whiting, Lyman Robison, T. C. Stebbins, and John Livezey, Jr., it was arranged that all preceding contracts between Stebbins, Robison, Patrick, and Bowman or Stebbins and Robison and W. F. Patrick should be merged into a new contract, which bound all the signers to stand hand in hand in the development of the property from its date, sharing *pro rata* all the expenses of its development or which might be incurred or be found necessary in defense of it. Starting from that date, some time in August, 1882, I can give you the total receipts and disbursements as set forth in our annual statements, a copy of each of which was distributed at the date of its making to every interested party, and which is as near correct as can possibly be, down to January 1st of this year, and if I had a longer time and could spare it I could give you from the books the record of the first quarter of this year; but I have not yet been able to make this. The statement of the receipts for 1882 and 1883 as appears of our record shows that they were $178,587.14. The disbursements were $177,761.93. This amount includes dividends disbursed. The bank balance on the 1st of January, 1884, was $825.31. The receipts for 1884 were $303,993.63; the disbursements, $302,358.81. This amount also includes dividends. The balance in bank, as shown January 1st, 1885, was $1,684.34. The receipts in 1885 were $283,015.40; the disbursements, including dividends, $272,417.10—leaving a balance in bank of $10,598.30 on the 1st of January, 1886. The receipts in 1886 were $276,796.30; the disbursements, $281,654.54, or
100 $4,858.24 more than received. The amount disbursed includes dividends also.

16th. Do you know the total amounts of receipts from & disbursements on account of said mines since the date you became manager thereof to the present date? If yea, state the total amount of receipts & total amount of disbursements.

Answer. I have stated the total amounts of receipts from the 1st of August, 1886, to the 1st of May (1887) as $144,341.64 and disbursements as $140,591.40.

17th. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully & at large in your answer.

Answer. I have endeavored in my testimony thus far to set forth facts and figures as accurately as possible, and I do not know that I have anything to add thereto, though, possibly, if my attention was called by direct questions other things material to the subject and of interest to the parties at issue might occur to me. I have, in a measure, put behind me all the old questions which time and hard

work have settled and which may be involved in the propor presentation of Col. Sellers matters. They were of sufficient evil in their day and I was in hopes that I was forever done with them.

Whereupon and at the hour of five o'clock p. m. of said day the taking of testimony was adjourned until May 18th, A. D. 1887, at two o'clock p. m.

May 18th, A. D. 1887, at two o'clock p. m., examination of J. C. WHITING resumed.

Cross-interrogatories by defendants, propounded to J. C. WHITING:

101 Cross-interrogatory 1st. When did you first become interested in the "Col. Sellers" and "Accident mines," in Lake county, Colorado?

Answer. I first became interested in the Col. Sellers and Accident lodes in the latter part of July or the first of August, 1882. Mr. T. C. Stebbins, under an agreement which I drew up, bargained to sell to me a one-sixteenth share from his interest remaining outside of his agreement, to which my attention had been called, of himself and other owners of the claims with W. F. Patrick and Frank J. Bowan, for the sum of $2,000.00. I was to have the privilege under that agreement of taking one sixty-fourth or two sixty-fourths or three sixty-fourths or the whole, as I might determine, upon the payment of $500.00 for each one sixty-fourth. I understood at the time from Mr. Stebbins that there was a trust deed on one-eighth held by him, and without consulting the records I took that to be the true status of his interest. He, along with his partners, Lyman Robison, Harvey Howard, and Samuel J. Glover, I understood, had entered into an agreement with Frank J. Bowman, the plaintiff, and William F. Patrick, the defendant in this case, to give the said Bowman and Patrick a one-half interest in the two claims upon condition that said Patrick and Bowman should sink to pay mineral or lime rock in place on the said properties or one of them. At the time of my purchase from or arrangement with Mr. Stebbins I was totally unacquainted, or very nearly so, with any of the parties I have mentioned. So far as I could I examined into the relationship existing between the aforesaid original owners and Mr. Patrick. Mr. Bowman was not in the camp, nor have I ever seen him save once in my life and that on a railroad train.

102 I made the running arrangement I did with Mr. Stebbins mainly for the reason that there seemed to be some complications affecting the property, and I wished for more time than I had given already to my examination to go thoroughly into the details with regard to the titles, contracts, etc., then existing. I gave Mr. Stebbins, under the agreement which I drew up and which I have not now at hand and cannot refer to, $100.00. He immediately left for Denver, and almost immediately I was called upon to look after the trust deed which covered the whole interest instead of the half, as I had been informed by Mr. Stebbins. That trust

deed, it appeared to me upon examination of the record soon afterwards, had been on the property for a year and covered one-fourth of the Col. Sellers and Accident mines. The consideration that that trust deed called for was the principal sum of $400.00 and accumulated interest. I took care of it after some hesitancy, deliberating for some time whether I would lose my $100.00 or advance more than $400.00 more. My interest then commenced with this transaction with Mr. Stebbins. The first deed I recorded on the 11th of August, 1882, the date of the deed being the 10th of August.

Cross-interrogatory 2d. What interest in such mines or mining property did you then acquire and what consideration was paid by you therefor?

Answer. I have stated in my answer to the first question that my agreement with Mr. Stebbins was to pay him $2,000.00 for one-sixteenth interest in both claims, provided I saw fit to buy that portion, having been in a measure forced to pay for the first one sixty-fourth before my agreement required me to pay for it, and being out somewhat over $500.00 before I knew much about the condition of affairs, I went to work at once to unravel the whole situation. Three days after my deed was recorded, or about August
103 13th, 1882, I visited the Col. Sellers shaft, which had then been sunk to a depth of about 248 feet, and the showing was such that, considering that I had waded in to the extent of between $500.00 and $600.00, I concluded I would make an end of the business, pay the remaining $1,500.00, and take the one-sixteenth interest entirely. Therefore, upon Mr. Stebbins' return from Denver, I had a deed made to me for the remaining three sixty-fourths, as per agreement, and became the owner of one-sixteenth in the Col. Sellers and Accident claims.

Cross-interrogatory 3d. Are you acquainted with the history of the said mines and the progress of their development? If so, state fully the different steps of progress made in the working and development of these properties, with dates as nearly as you can recollect or determine of the discovery of ore, the placing of said property on a paying basis, the chief difficulties of the development, and the times at which such were overcome, and any other facts which may occur to you with respect to the progress of the said mines as paying properties.

Answer. I am thoroughly acquainted with the history of the Col. Sellers and Accident mines and the progress of their development from the time of my purchase into said properties, as set forth in my answers to questions 1st and 2d and this, because I have been actively engaged in following it from that time. I know this portion of its history because I have been a partner. I am also cognizant of the entire history of the said mines from the date of their location by T. C. Stebbins and Lyman Robison. This information has been acquired by me necessarily in the course of events and through my connection with the mines.

The Col. Sellers and Accident claims were located by T. C.
104 Stebbins and Lyman Robison. The Col. Sellers claim was

located on the 4th of July, 1879. The date of the location of the Accident claim I do not remember, but it was some time in 1880 and I think in January or February. There is a suit now pending, to which I have referred in my direct examination, on the title of the claim called the Accident, and, in looking up this matter and in reading the testimony on both sides as it has been set forth, I find that disputes arose in this way: Mr. Stebbins and Mr. Robison located two claims, one the Col. Sellers and one they called the Rickawell. It is claimed that the Accident claim is the old Rickawell claim and the Rickawell claim was located, if there was such a claim, at the same time as the original location of the Col. Sellers, July 4th, 1879. The Accident claim was another location, made the first of the next year. From about February, 1880, then, Mr. Stebbins and Mr. Robison first appear as the joint owners of the Col. Sellers and Accident claims. Certain interests were acquired from these owners by other parties, viz.; Samuel J. Glover and Harvey Howard, and these last two with the other two or the original locators were the parties who entered into the arrangement aforesaid with Frank J. Bowman and W. F. Patrick. I looked carefully into this contract which had been entered into by the owners of the property with Mr. Bowman and Mr. Patrick. I also turned my attention particularly to the title of the Accident claim, and I found that it was so dubious that when I entered into negotiations with Harvey Howard, of Ohio, for the purchase of his remaining one-thirty-second interest in the claims I concluded that it was only a question of time when there would be some suit brought by Harvey Howard against Robison and Stebbins to determine the title to the Accident claim and I did not care to buy further into lawsuits, which is the reason why my interest in the Col. Sellers was
105 larger than it was in the Accident claim. As my investigations of the whole matter proceeded I found a great many things which I had not expected to find, and which made me declare, in not very appropriate words, that I had paid altogether too high a price for my interest in the two locations, for they were nothing but locations, no patents on the claims existing. The very surveys had afterwards to be amended; in fact, new locations—in one of which my own name appears—were made on the Col. Sellers claim. The whole thing seemed to be afloat. I had been led to believe that the Col. Sellers and Accident claims covered a much larger acreage than, after careful examination, I found to be the case. Almost the first thing I discovered was that a claim bearing the name of "A. P. Willard" took off nearly three acres from the north end of the two properties, an acreage that I supposed I had bought an interest in. I found that this A. P. Willard claim had not been patented, but all the preliminary steps necessary to a patent had been taken. I remember of speaking of this matter to Messrs. Robison and Stebbins, and the impression I gained from them was that I was learning altogether too much in a short time. However, being almost unacquainted in Leadville, not knowing whom I could trust, and not wanting to ask too many questions, and getting but little consolation from those with whom I had associated myself, I made bold one

day to go directly to the land office to inquire if a patent on the A. P. Willard had been obtained. The gentleman in charge wished to know if I was interested in the claim, and I told him I was very much interested, and he then stated to me just how the matter stood with that claim; that its surveys had been approved; that the publication under the laws of the land office had been made—a fact which I had found out before—and the reason the patent had been
106 delayed in its issue for eleven months, was that the office in Washington was calling for additional "proofs of publication." Finding that the issuance of that patent hung on a mere technicality and conceiving that I might stop its issue by a protest, I left the land office, hunted up an attorney by the name of Weston, who was a brother-in-law of Mr. Livezey, one of the owners of the Col. Sellers mine, and told him I wanted to make a protest before the sun went down. The protest was made, but we lost the territory, the Secretary of the Interior holding that there had been plenty of opportunities to adverse and a protest could not be recognized.

Continuing my investigations, I got hold of a copy of the contract of Stebbins, Robison, and the other owners with Bowman and Patrick and examined it very critically. In the meanwhile the shaft was being sent down as rapidly as possible, and it was within a very short time after my acquiring my one-sixteenth that it began to look as if we might find a mine; also a second contract turned up, of which no record had been made, between Lyman Robison and Theodore Stebbins on the one part and William F. Patrick, as I remember, on the other part, in which contract the first parties agreed to save the second party free of costs and expenses which might grow out of an adverse claim which prior to my purchase had been made upon both the Col. Sellers and Accident claims by a party who we have always spoken of since as jumpers. Before completing my purchase of the three sixty-fourths from Mr. Stebbins (and I had made my running arrangement with him in order to look up this adverse claim which covered nearly the whole property which Messrs. Stebbins and Robison claimed and to see which had the better title to the premises) I found the situation of affairs about as follows with respect to the two claims:

107 I have given a short history of Messrs. Stebbins and Robison's connection with the ground. The connection of the jumpers with the property began almost of equal date with that of Mr. Patrick and Mr. Bowman under their contract. The case was stated to me in this way—this at the time when I was getting into the property: That a contract had been entered into with Messrs. Bowman and Patrick in February, 1882; that Mr. Patrick was to have the general management of the work to be done under that contract, as he was a resident of Leadville and Mr. Bowman's business demanded his residence in St. Louis; that, under the contract as stated, Mr. Patrick took a surveyor upon the ground and located the place in which to begin operations on the shaft; that the next day, having selected a man to do the work of sinking the shaft, the man had gone to Union gulch, which is one of the gulches south of

California gulch and belonging to this California mining district, to get his tools; that he returned with his tools the succeeding day—that is, the second day after the location of the shaft—to begin his work, when he found some men on the ground claiming the premises. Their claim was based upon the ground, I understood, that the owners of the Col. Sellers and Accident (that is, Messrs. Robison and Stebbins and their co-owners) had failed to do for 1881 the necessary amount of work on the claims demanded by the law of assessments, and that they proposed to hold the ground. Now, all this was while I was in the East, and, possibly, before I had heard anything of the Col. Sellers and Accident claims. The location of these jumpers was duly recorded in the name of the Little Hope mining lode, ledge, or deposit, and it covered nearly all the surface remaining within the locations made by Stebbins and Robison as the Col. Sellers and Accident claims. As a matter of fact, I can state, at this late day, that it covered the entire
108 ore body of the two mines. A small portion, about 125 feet in length and 234 feet in width, of the Col. Sellers claim, being its south portion and lying in California gulch, under the bed of the creek mainly, was not included in the Little Hope location. Now, the question of purchase and of titles presented itself to me in this way: Stebbins and Robison declared they had done a sufficient amount of work to hold the claim. If they had not done the requisite amount of work, then, it seemed to me, that entering into a contract with Bowman and Patrick, Patrick having, under that contract, gone upon the ground and located a site for the shaft and attended to the surveys necessary to enable him to locate that shaft properly, work had been resumed under the law by the original owners and before any adverse claimants had appeared upon the premises, and, if this was not a correct judgment in the premises, then one other chance of making the best title to the property, so far as my side of the question was concerned, and by co-owners, remained. If we struck mineral first, failing on the other point, we would make title through this connection, and, having satisfied myself with reference to this, I concluded that my chances with the Robison and Stebbins party was a fair one, and, as I have stated, I concluded my arrangement with Stebbins by taking in the whole one-sixteenth interest, and from that time I devoted all the energy I had to the unraveling of the complications that existed and which afterwards came up. When I bought into the property the shaft had attained a considerable depth, as I have stated, and within three days after I got my deed there were indications at the bottom of the shaft which were quite encouraging. Believing that a good deal rested upon the discovery of mineral, I watched the work very closely, and upon the very first indication of mineral I descended the shaft and took samples. There was a showing near
109 the bottom of the shaft, on the south face thereof, of decomposed blue tale or ore when I took sample of it, I did not know which. This, as it appears from the memorandum I made in my book at the time, was on the 13th of August, 1882. I was careful to put down the date, and I was also very careful to go over to

the jumpers' shaft, which was a little over 100 feet away, and to examine their work. I noted particularly the character of the stuff they were hoisting from the bottom and made a memorandum to the effect that on the 13th of August, 1882, we had struck something that appeared to be the top of a mineral chute, and that there was no sign whatever on the dump of the jumpers or in the stuff that they were hoisting from their shaft that they had any mineral, and I wish to say about these jumpers that, true to their expressed determination to gather in the territory, they commenced to sink a shaft and pressed it with a good deal of energy. Now, this commencing was before my appearance on the scene. When I appeared on the scene both parties were hard at work, and it was told to me and I have every reason to believe that it was true, for the records of the court corroborate the story, that the Patrick shaft, as it was making greater progress than the shaft of the jumpers, was one night loaded with dynamite and blown up. While we were never able to fix the act upon the jumpers, of course it was the general belief that they were the instigators of it and that the Patrick shaft was blown up in order that the shaft of the jumpers might be put down to mineral before the Patrick shaft. Now, in this connection—and here I only state the matters as they were stated to me—I wish to state that upon the blowing up of the Patrick shaft there was some little delay on his part about proceeding further. I have always understood that right then and there Mr. Bowman
110 began to weaken. It is a matter of record, almost, that Mr. Patrick also lost courage, for the contract which I have spoken of as having turned up during my investigations, between himself and Messrs. Robison and Stebbins, was then and there demanded by Mr. Patrick before he would continue operations. Had he stopped then the jumpers would probably have acquired the property. Now, this was the condition of affairs when I got into it. There was a contract with Bowman and Patrick; there was another contract with Mr. Patrick (and possibly Bowman was a party thereto also); there were jumpers on the ground, and almost immediately after I purchased another difficulty developed. The showing of the mineral chute, which I have spoken of, developed in the shaft as it was put down into what we denominate here a strong feeder of ore. I will say that I took samples from the first showing as I have described it, and I could not get a trace of value, but it led to value; or, rather, it led to a low-grade sulphide ore as the shaft was continued. Along about the 1st of September sufficient progress had been made, in the opinion of Mr. Patrick, to warrant a demand by him for his deed under his contract. That contract stated that the deed, which was made at the time of the making of the contract, and was placed in escrow, was to be delivered under certain conditions, one of which was the discovery of pay mineral. Mr. Patrick claimed that pay mineral had been discovered, and that according to the terms of the contract he was entitled to his deed. Messrs. Robison and Stebbins disputed this discovery, and now there was a row on the outside and a row on the inside. In the face of these affairs I got the documents and papers before me and sat down in Mr. Ger-

hard's hardware store, in Leadville, to see what I could make out of the situation, and it occurred to me, since I was satisfied we never could get through if we began to dispute among ourselves,
111 that it would be a fair compromise arrangement if the parties on my side could be made to agree to deliver to Mr. Patrick the deed he demanded, and he, Patrick, could be induced, for such consideration, to stand hand in hand with the rest of us and prorate all through on expenses, no matter how incurred, for Mr. Patrick's second contract with Messrs. Robison and Stebbins was to the effect that he should not be responsible, but that they would undertake to pay all the expenses growing out of litigation arising through the jumpers' claim. Mr. Patrick, in his original contract, along with Mr. Bowman, had agreed to get patents on the two claims, and to Mr. Robison and Mr. Stebbins it appeared, at least so they claimed, that he had agreed to do what afterwards they or he had insisted they should do—that is, pay for getting the patents, for the patents could not be obtained except by getting rid of the adverse claimants, and here was the conflict. I drew up a draft of a contract and took it down to Judge Bissell's office and suggested, as he was Mr. Patrick's attorney, that he see what could be done in the premises. From this initial step there resulted an agreement, the date of which I have forgotten, but it was quite early in my connection with the business, whereby it was agreed to deliver the deed on the part of the makers thereof in consideration of Mr. Patrick agreeing to pay his *pro rata* share of any and all expenses thereafter. Now, in fixing this agreement the question of Mr. Bowman's relations to Mr. Patrick came up. The matter was thoroughly gone into and sufficient evidence was offered to me and to my copartners, as we believed, to insure us safety under the new arrangement, but in order that there might be no doubt about it there was incorporated into the contract a stipulation to the effect that Mr. Patrick
112 would save and hold all the other owners harmless under the Bowman transaction; and further, that there might be no doubt as to how much Mr. Patrick was agreeing to pay under this arrangement, after all the other conditions had been settled I suggested that there be added to the contract a distinct specification as to what Mr. Patrick's interest with us was to be, and that the *pro rata* be exactly set forth for which he was to be responsible. I have a copy of that contract somewhere and could refer to it probably in ten minutes, but I have not looked at it for years and am testifying now from memory entirely, but remember the matter so distinctly that there can be no mistake about my understanding of the condition of things when I bought into the disputed territory, believing that I would have nothing to do but sit down and await results without any further expense to myself except the purchase-money, which I had already began to feel had been altogether too much.

From this contract we date our history as colaborers, coworkers, and co-owners of the Col. Sellers and Accident mines. The deed having been delivered to Mr. Patrick, he continued work, and in a short time our shaft had penetrated a solid body of sulphide ore, into which it

extended perhaps two or three feet, when the influx of water was so great that no further progress could be immediately made. The jumpers also continued their labor, and in the latter part of August also succeeded in striking mineral; then water came in and drowned them out. During the progress of both shafts both shaft-houses resembled arsenals. Both parties were strongly armed, and, as they were less than 125 feet apart, the situation was often very interesting. With the incoming of water Mr. Patrick, to carry out his arrangement with us, and, as we all understood, to complete his
arrangement with Mr. Bowman, left Leadville, and he did
113 not return until some time in October, if I remember right.
He was gone at least nearly two months, if not all of two months. During his absence those of us who remained on the ground kept at work. We tried to handle the water, first with a steam pump and then with a steam head, and we managed to sink the shaft a couple of feet or more and it was still in ore—all ore. I took samples of the ore when we first struck it—when there was no longer any doubt about the strike—and discovered it to be an ore totally unlike anything at that time being worked in the California mining district, which means the city of Leadville and all its mines. The discovery, such as we had, seemed to disappoint all my co-owners. It had been confidently believed that if we found any ore at all we would get ore of the usual character in the camp—a carbonate ore—and I remember distinctly that for months afterwards there was a good deal of kicking among the owners because all their efforts failed to bring them what they were looking for. Sulphide ores had been struck in the Wolf Tone mine before I went to Leadville, in June, 1881. Sulphide ore had also been found in the A. Y. mine five or six hundred feet from where our shaft was sunk, but the character of the ore had been such that there had been no money made out of it, and the discoveries had been abandoned where they had been found just as soon as the mine-s named found what they, as well as everybody else, were looking for, viz., carbonate ores; and in both of these mines mentioned the ore remained unutilized until a very recent date. It was our fortune to strike a sulphide ore body somewhat different from the sulphide ores which I have said were found in the other mines, but it presented to us quite a different proposition from what we had been expecting. However, I will speak of this further on in my testimony. Immediately upon
the discovery of ore by the jumpers, also on the territory
114 which we both claimed, further steps were taken by them to
get rid of us. They had conducted their operations very carefully and somewhat unscrupulously. Neither of us for the time being could make further progress, but we both continued to fortify our positions. The guards were not relinquished, and every effort was made by both sides in the way of preparation to defend title.

I wish to state that we had rather a formidable opposition in the body of men which we always spoke of as jumpers. The whole court-house ring of Leadville was included among them. There was a county clerk and recorder, two justices of the peace, the clerks of two courts, and, I believe, the judge of the district court before

whom our case would have to go, standing in quietly with the county recorder. Altogether, as their interests were divided up from time to time, we came to have against us ten or twelve contestants. To make their calling and election sure during the progress of their work, in the summer of 1882—and this before my connection with the Col. Sellers and about the time they blew up Mr. Patrick's shaft—they salted their property, the salt being in the nature of carbonate ores brought from a mine in the district, and, with a good deal of ostentation, calling witnesses on the ground, they hoisted the ore that they had stuffed into the crevices of their shaft, and, what is more, they had these witnesses to go into the recorder's office, an unprecedented proceeding, and make a record of the fact that at such a depth in their shaft on such a day ore had been hoisted from the Little Hope claim. This in order to prove priority of discovery and establish a better title than we had to the premises. Further along in the history of this contest for the ownership of the ground one of the owners or one of the claimants under the Little Hope title (claiming to own at the time
one-eighth), who had been associated with me in another
115 mining operation, and under whom, as contractor, the second, third, and fourth fifty feet of the jumpers' shaft had been sunk, came to me, having fallen out with his copartners of the Little Hope, and gave me the facts to which I have testified in regard to the salting of the shaft and many others; and not only he but other miners, friends of mine who were cognizant of the work that had gone on there, volunteered to help me when the case came to the courts, and I collected a mass of information which was of great benefit to us subsequently. When Mr. Patrick came back from St. Louis after an absence of about two months with everything settled as far as Bowman was concerned, we took counsel what we should do in regard to further operations on our shaft. Under the new arrangement with Mr. Patrick, Messrs. Robison and Stebbins, as well as the rest of the owners, were compelled to pay their way, but neither of them had any money, those of us who had went ahead. When we could not pay we got trusted, and as some of us had pretty good credit we ran on very well for a while, but it was evident to all of us that we would have to have powerful machinery, and that we would have to put in pumps and buy an engine and boiler. We rented a boiler for a time, but we could not find any one who wanted to furnish these needed things without some cash. We finally got what we wanted, and along about the 1st of March, 1883, with our pumps in and our boilers and engine and other improvements we were ready to go ahead and sink deeper our mineral, and the first thing we did was to sink our shaft to a depth of 300 feet and one-half inch. This carried us through our ore body, which was struck solidly at a depth of 273 feet. We then run a drift over to the jumpers' shaft, tapped that shaft, put in a bulkhead, and gave them a cordial invitation to come down. We were then all ready to begin to ship
(and this before we ran the drift spoken of), when we
116 had this state of affairs: Mr. Patrick and Mr. Simmons and

myself had contributed not only our *pro rata*, but largely in excess of our *pro rata*, in the way of opening up the mine. There was no certainty that we would ever own it and the ore was not desirable; no smelter wanted it. Its grade, considering the condition of affairs with the smelters, was not high enough to warrant any very great expectations, and I insisted that, as we were all ready to start, it was now a good time to stop and clean up. Mr. Simmons and myself—and he through me, for he was not on the ground—absolutely refused to put up another cent until such of our co-owners as were indebted to us gave us some kind of security. I managed that and we got it fixed up. Now, before this date which I have given you and in December of the previous year one John McKenzie, under a contract which he had with Robison and Stebbins (made at the time of their original location) brought suit against the said parties for all their interest and *looks* to, say, the whole property. It seems they had agreed with said McKenzie to pay him the sum of $500.00. When they went onto the ground to locate it they found this McKenzie on the spot, claiming the territory, but he hadn't located it. To get rid of him they bought him off under an agreement which compelled them to pay him $100.00 cash and $400.00 if they ever sold the property and when they sold it or when they struck mineral. Therefore, when, under the Patrick contract—a subsequent arrangement—mineral was found on the premises, Mr. McKenzie produced his contract and asked them, Robison and Stebbins, to conform to the terms of it. He carried it into the court and they confessed judgment, and under that judgment both the interests of Robison and Stebbins were later advertised for sale on the steps of the court-house, the day of sale to be the 10th of December, 1882. On that date Mr. Robison managed to get
117 a portion of the demand money together and Stebbins on his part succeeded in getting the sale postponed ten days. Mr. McKenzie happened to be out of town or it might not have been postponed. On the 20th of December, then, certainly thirteen sixty-fourths, or Robison's interest, which was the amount remaining to him after completing his arrangement with Patrick, and the eight sixty-fourths remaining to Mr. Stebbins were to be sold. Now, it occurred to me if the sale took place that some one of the jumpers might buy in the interests or the whole property possibly, and thereby secure a double title, which would forever prevent us possibly from settling our difficulties. It occurred to me, too, that I might do the same thing, but I had no disposition to play that kind of a card unless it was absolutely necessary, so on the last hour of the last day—that is, on the 20th of December, 1882—at the earnest request of Mr. Stebbins, who was a man that everybody knew and an exceptionally popular man, I had the judgment transferred to me and paid its demand. Mr. Stebbins with all his acquaintance and all his popularity had been unable to borrow the less than $200.00 which it took to save his interest. Further, with that transfer of judgment in my possession, and both Mr. Stebbins and Mr. Robison's interest in my hands under it, a trust deed was forced from Robison and a loan made to him under it of $3,000.00.

His interest then consisted outside of the Patrick-Bowman contract of thirteen sixty-fourths of the Sellers and fourteen sixty-fourths of the Accident. The trust deed was taken covering twelve sixty-fourths in each, he desiring that the remaining one sixty-fourth, as he put it, on the Col. Sellers claim might be left in such a shape that he could sell it. He tried very hard, as I remember, to sell one sixty-fourth, and he might have succeeded had it not been for me. It seemed nobody in those days wished to take any
118 chances in a property (I do not speak of it as a mine, for it was not a mine then) except those whose principal business in life is to take desperate chances, to wit, the gamblers, and when I found that a certain owner of a faro bank in Pueblo was interesting himself in regard to that one sixty-fourth I concluded that the best way to stop the transaction and put myself on a talking basis with respect to all such people afterwards, so far as the Col. Sellers was concerned, was to sell a little myself at an extremely low price, and for this reason, more than for any other, I consented to sell to Mr. J. J. Simmons a one sixty-fourth (for which I received less than I paid) in order that, with the three sixty-fourths which Mr. Patrick wished to unload, Simmons might have a one-sixteenth. Further than this, and without saying anything to my co-owners about it, as we approached the time when shipments possibly might be commenced I arranged, through a gentleman named C. B. Weeks, whose last address was Jackson, Michigan, to get a bond out of the jumpers. I detailed my plan to Mr. Weeks, a gentleman who had been connected with the American smelter here and knew some of the parties who were claiming adversely, to wit, the jumpers, and set him at work. I told him to pick up all the small interests first, if possible, and get a bond, at as low a price as he could, out of, say, the holder of a thirty-second for two months or three months or as he might be able; to get a sixteenth of another party or an eighth from a third upon whatever time and terms he could. If a man would not give a four months' bond, to take a two months' bond, and when the two months' bond expired we would present the situation and get it extended, and so would keep the bond running, my object being to play my cards so that they would win. It was not demonstrated to me with any certainty that I had been spending my money so that I would get it back. I was
119 unwilling to believe, for evidences sufficient had not been shown that the ore we had found was a bonanza or anything of the kind. I knew positively what we had, and I could not see, in view of all the circumstances, that I had gotten so far very much for the money I had spent, which, to be sure, was no great sum, about $3,000.00. Mr. Weeks undertook this job for me, and, not being so well acquainted with the circumstances as I was, he went first to the very man I told him to see last, and that man gave the scheme away to a Mr. John Marshall, who was a brother of the Judge Marshall of whom I have spoken of not very respectfully in this testimony. Mr. Marshall temporarily blocked my plans, but, being in no wise discouraged, I told Mr. Weeks that he would get along better hereafter if he would follow my advice and not take

advice from other people. At the first, now, he should see whether Mr. Marshall's bond which had been obtained included all the jumpers. I learned that one man still retained his interest unbonded. I immediately had Weeks see him, and as he knew him very well he got him to promise that he never would give a bond to Mr. Marshall. I then got Mr. Weeks to see a Mr. Mahoney, who was one of the jumpers and one of the clerks of the court heretofore spoken of, Ryan, one of the jumpers, and Judge Shire, so called, another justice of the peace, and some other of the most prominent holders of the adverse claim called the Little Hope, and he got out of them a sub-bond in which the agreement on Mr. Weeks' part for me was to pay for a five-sixteenths which their names covered in the Little Hope and in the bond the sum of sixteen thousand dollars within a time which I think ran to the 10th of April, 1883, and if within the time we paid that sum, then the bond which they had secured, together with their interest in the Little Hope claim, was to be turned over to me, and the length of that bond that was to be turned over was six
120 months, which would carry us over into the summer months.

Having secured this bond for myself and secured ourselves jointly against our impecunious partners and gathered up our affidavits and testimony in the case between us and the jumpers (which had now been regularly put before the court,) we commenced shipments from the Col. Sellers mine from the Patrick shaft. The books show that the first shipment was made in March, 1883. My memorandum shows that ore was found in August, 1882, and I have endeavored to show some of the difficulties of our progress from the date of the discovery of mineral in the shaft to the date of the first shipment of ore, the time of which covers about nine months. When we began to ship ore I held the jumpers fast by their bond, and I held that bond until three shipments had been made, and, through the influence of Mr. Weeks, I prevented an injunction being attempted until I was satisfied of the value of my possessions, and then I let the bond run out. Now, not until we had made those shipments and not until after I had spent twelve months and three days away from my family was I satisfied that I had spent the money I put into the Col. Sellers to any advantage.

Whereupon and at the hour of five o'clock p. m. the taking of testimony was adjourned until May 19th, A. D. 1887, at two o'clock p. m.

At two o'clock p. m. taking of testimony was resumed.

J. C. WHITING.

(Continuing answer to the 3d cross-interrogatory:)

To further set forth the difficult situation of affairs between the time of the discovery of ore and the first shipments of the same I wish to refer to another agency of which we made use to secure our position upon the premises and secure success-
121 ful issue of our fight against the adverse claimants.

Immediately upon Mr. Patrick's return from his eastern

trip—about October, 1882—I called his attention to the fact that the claim of our adversaries, as staked on the ground and as set forth by their records and maps in the land office, did not cover the whole of the Col. Sellers location or the whole of the Accident location, but that there was left to us outside of the conflicts, as shown by our respective maps, a portion of ground on the south end of each of our claims about which there could be no possible dispute; that we were the only claimants of it, and that it would be to our advantage to sink a new shaft on the undisputed terrotory, so that in case an injunction should lie against us on the ground which was in conflict we would still be able to continue our operations on undisputed territory; that if we got no mineral in the new shaft on such territory we could possibly drift from it into the disputed territory and get hold of some of the values which were supposed were there and possibly make ourselves good on our whole outlay before we were disturbed, but at this time my advice did not prevail. However, some time in December the iron mine, which owns the adjoining ground to the eastward of what is now our Accident claim, began to sink a shaft on their premises and almost at the same time some parties made a new location across the south ends of both our claims, making an elbow in the location, so that it included a good deal of ground now included in the Col. Sellers and Accident claims, and began to sink a shaft. We were then in this situation: We had a shaft 125 feet to the eastward of us in armed possession of adverse claimants, and we had shafts begun on both sides of all our undisputed territory, and I insisted at this juncture that we should take some
122 steps to prevent these two new parties from sinking to mineral and getting into a position from which, considering our own situation, they might abstract mineral from the disputed territory, and I again said that the shaft should be sunk on that portion of the territory included within our claims which was not adversely claimed by the Little Hope party. The difficulty about this matter was that money seemed to be a scarce article with some of us. As a matter of fact one of our joint owners had up to this time contributed almost nothing, and as a matter of fact he was never able to put up but $19.50 until I secured him a loan of $3,000.00, which loan was absolutely necessary at the time to keep our credit good and pay up debts, which had he and some of the others been less impecunious would never have been incurred. We got at the matter in this way finally: I suggested that we lease the premises and throw the expense of sinking the shaft upon other parties. T-is was done. I took an interest in that lease and I gave my personal attention to it for nearly thirteen months. A shaft was sunk in the bed of the creek of California gulch and carried down in spite of all the difficulties to a depth of 220 feet. There was a clause in our lease, which I drew—the usual clause—which forbade the transfer of any interest by the lessees without the written consent, not of any manager of the Col. Sellers mine, but of every individual owner. This clause, which is frequently not observed, although almost inserted in a lease, it was very essential to us should be strictly fol-

lowed and lived up to, because the danger was that some of the jumpers otherwise might acquire an interest also in that portion of our territory under this lease. However, it was not lived up to on the part of the lessees, and very soon there were fifteen or sixteen different claimants under the lease; but, to make a long story short, we closed this matter with
123 the lessees along in June, 1883, I drawing up a contract agreeing to visé all the transfers up to date in consideration of their agreeing to do some other things of a rather extraordinary character, one of which was that they should select from their number one man who should be absolute dictator of their affairs. As far as we could make it so to him his word was the law on their side. I stood behind him and saw that it was the law. The parties who had been taking interests in the lease, no sooner than they had a transfer in their pockets, would make a transfer to somebody else, and it was accordingly agreed that if after the date of this contract any one of the lessees wished to get out of the lease he should forfeit his interest as liquidated damages to those who remained and accept for payment for his services, if he had done work by the day, a certain consideration in dollars and cents, which he further agreed should be paid out of mineral if ever any should be found. If he had contracted to furnish the coal or the machinery or to do anything else in the way of developing the property under the lease, which was not strictly speaking day's work, then he was to accept a certain consideration to be paid for out of ore whenever it was found. By hook and by crook I kept a wrangling crowd of lessees (amounting in number at last, as I remember, to about twenty-one men) together for thirteen months. When I drew the last contract spoken of, making one man absolute master of the situation, I withdrew from the lease, but I contributed my own money, and Mr. Gerhard backed me up in this enterprise down to the last moment. I stood responsible for hardware bills and lumber bills, and when late in the thirteen months and before the lessees had found ore the superintendent of the lessees and the manager appointed by them under the contract which I had drawn declared they could not possibly carry their interests any longer I per-
124 suaded them still to go on by the offer of pecuniary assistance and they went on. In the meanwhile, the Patrick shaft of the Col. Sellers was made use of to assist them. A drift was run from the bottom of that shaft toward their shaft and it was carried through 155 feet of ore when it reached a break. The lessees' shaft in the gulch was still 150 feet further along on the line of that drift, but the drift from the Patrick shaft had crossed the line of our conflict with the Little Hope at about 100 feet from the shaft and exposed a length in ore of about 55 feet, which was on the undisputed territory leased. To reach this ore the lessees ran a drift from a depth of 200 feet in their shaft, or at a depth represented in our Patrick shaft of 340 feet, northward and so into the ore which we had exposed for them. They struck the ore where it was 27 feet thick and immediately interests changed hands in the lease at high figures. I made a contract at the Elgin smelter for the lessees for

the delivery of 1,000 tons of ore. The ore was delivered under that contract and our royalties amounted to between $1,100.00 or $1,200.00. But the more we tried to do for the lessees the more they seemed to think that we were trying to mislead them, and as fortune seemed to be dawning upon them all they wrangled all the harder. The new men who had bought in at high prices insisted upon ignoring the contract which had been made at my suggestion and undertook to carry things with a high hand. As a consequence, I ceased to give them any particular assistance and left them to their own resources. They now made their contracts themselves and proceeded to turn out ore under the same, and the first results of their shipments was a call from the smelter, to which they had shipped their ore, to pay a freight bill on the same amounting to over $800.00, the ore as they had handled it having run and been that much in debt. To make a long story
125 short, they finally came to us asking us to loan them the royalty due to us from the smelters under my contract for 1,000 tons and we sonsented to do it in consideration of four of the parties, whose endorsement would be good, giving us a note for the amount. They ran on independently awhile longer, until their business became more and more entangled, and finally the endorsers on the note came to our office and wished to know if we would not make them a present of the amount of that note, as they were very heavily in debt and affairs were getting worse every day. Then I made them this proposition: That if they would turn over everything they had in the way of improvements, pumps, low-grade ore, and implements, and would come to our office with a clean bill from all their creditors and would get off the premises we would give them the note, being willing to contribute the amount of the same—between $1,100.00 and $1,200.00—to pay their debts. This was done and the Col. Sellers owners came into the possession of the shaft since known as No. 4 and improvements, which cost the lessees over $16,000, and this at an expense to the company of only the amount of royalty as stated. Individually it cost myself and Gerhard as much as it did all the other owners put together. It also cost me besides time and money a lawsuit, from under which I only escaped by the production of the contract made for the lessees.

I have shown that we commenced to ship ore in March, 1883, and for my protection I had taken a bond for the parties called jumpers in this testimony. That after three lots were shipped the bond ran out, as I had intended it should when I took it, but the adverse claimants were still on the ground, and they and ourselves, of course, had been gathering our forces for the final conflict in the courts. I had some acquaintance with the parties interested with the
126 jumpers, and as their difficulties thickened and disturbances arose among them I was made the recipient of a good deal of valuable information by some of the discordant parties. A day was set for the injunction proceedings, but the parties never came to trial, for one of the original jumpers—and there were but two—voluntarily made affidavit that when he and his partner went onto the

ground and jumped it Mr. Patrick's party were already at work there.

And it also came about that in the spring elections the court-house ring, with whom we were contending, had been somewhat shattered. A new judge had been elected, and in this and various other circumstances the situation, as between us and them, had been materially changed. The testimony that we had accumulated I made bold to speak of about the town, and I always have been of the opinion that, finding we were so well prepared to show what a disreputable crowd they were, they were glad not to try issues with us in court, more particularly, too, as the sulphide ore in dispute was pretty universally admitted to be a very questionable find. There was not, I will say, in that day a smelter in the State of Colorado that was prepared to handle the ores as they should be handled.

As soon as we commenced shipments we made up our minds the first thing to do was to pay up our debts, and as quickly as possible. With our debts paid, we knew we had nothing to do but to attend to the lawsuit on our hands. We got out of debt, each of us collected, in the way of a dividend, the amount of our cash contributions, and then we waited for developments from the other side. At this juncture I was called away by a telegram stating that my mother was on her death bed in Rhode Island. Before I left we all talked over the course to be pursued with respect to the jumpers, and I advised that if we could buy them off for a
127 sum not to exceed $5,000.00 it would be the best thing for us to do. While I was away this was done, and the man who was used as a go-between, between us and the jumpers, was one of the jumpers, and the one who had not entered into the bond with Mr. Marshall, which he had agreed not to do upon the promise from me, through my manipulator, Mr. Weeks, that I would see that he got his money back. We paid the jumpers *pro rata*, $4,000.00, and we paid this man the difference between his *pro rata* of $4,000.00, and what he showed us he had expended on the jumpers' shaft.

Now, I have stated nothing in this testimony about the midnight arrests, the charges and counter-charges that had to be met in the courts, or the street fights, or the proposition from the jumpers that if the Col. Sellers owners would enter into an agreement to divide the premises all could go in together to work them, or of a hundred other difficulties or of matters and things which came up during our long struggle to put the Col. Sellers mine upon a paying basis and make our claim entries worth what had been expended upon them.

Cross-interrogatory 4th. State whether A. J. Gerhard acquired an interest in the said mines or either of them and at what date and for what consideration. If such interest or interests were acquired through you, state, as nearly as you can recollect, the condition and apparent prospects of the mine referred to at the times said interest or interests were acquired.

Answer. My answers to previous questions are a sufficient answer to this. He draws his title through me, so far as my one-sixteenth

purchased of the Stebbins interest goes. The Harvey Howard interest or the Ohio interest, as I have named it before, we bought together. I have stated that I paid Mr. Stebbins $2,000.00 for
128 the one-sixteenth interest. We paid for the Howard interest $1,500.00, but we regarded this interest as unincumbered by anything except the adverse claim of the Little Hope party. As matters stood then (at the time of purchase) I advised that we buy the property held by Harvey Howard for the reason that Mr. Howard was not a party to our new arrangement with Mr. Patrick, and that his one thirty-second interest in the Col. Sellers was outside of all possible litigation except through the jumpers, and that it was not even pledged to the payment of *pro rata* expenses under our contract with Patrick. Mr. Gerhard had not signed our contract with Patrick, but I had, and I told him that if I, possibly b*e*becoming an owner of one-half of the Howard interest, might be bound under that contract, he certainly could not be; he was then unknown as an interested party; and so, to save a point, we took it in at the high price of $1,500. The prospects of the mine at the time of the purchase of the Howard interest, so far as the showing of ore was concerned, were improved over what they were when we purchased the Stebbins interest. The deed of Harvey Howard to myself and A. J. Gerhardt is of date September 23d, 1882. I had the deed made in Leadville and forwarded it to Mr. Howard in Ohio, or, rather, to a bank in the town where he lived, the name of which I have forgotten, and it had been arranged through correspondence that when he signed the deed his draft on Gerhard or the Mechanics' bank in Leadville would be honored and the Mechanics' bank forwarded the deed, with a letter to this purport. The deed was filed for record December 27th, 1882.

Cross-interrogatory 5th. Between the first of July, 1882, and the first of March, 1883, were there any conveyance or sales of any interest or interests in these mines other than those referred to by you in your answer heretofore? If so, state between whom such
129 transactions took place, what such transactions were, and what considerations were given for the transfer of such interests, with the dates of such transfers, as nearly as you can recollect or determine.

Answer. My first deed was dated the 10th of August, 1882. My knowledge of what occurred in July, 1882, is derived from the records in the shape of an abstract of title which shows that on the 3d of July, 1882, Theodore C. Stebbins transferred to John Livezey, Jr., a one sixty-fourth of the Col. Sellers lode. The abstract of title does not show that at the same date there was a transfer by the said Stebbins to the said Livezey of two sixty-fourths of the Accident lode, but I believe the same to be the fact and possibly the records show it, but the abstract which I hold in my hand does not. As to the consideration, I do not know anything about it. The consideration stated in the abstract is $1,000.00, but I have always understood it was about $150.00, although I know nothing about it except what I have heard. Stebbins' deed to me of three sixty-fourths in the Col. Sellers and Accident lodes was dated the 14th of August, 1882, ac-

knowledged the 16th of August and filed the 22d of September, 1882. The consideration is properly stated, $1,500.00. I have stated the date of Harvey Howard's transfer already. On the 27th of September, 1882, I transferred to Albert J. Gerhard one thirty-second in the Col. Sellers and Accident lodes. The consideration stated in the abstract is $1,000.00, which is correct. Now, on the 6th of November, 1882, there was a deed recorded which was of date February 17th. The acknowledgements of the same were made on the 17th and 24th of February and the 13th of March, 1882. The difference in the dates of acknowledgements is accounted for by the fact that the deed was sent from Leadville to Chicago and then to Ohio for the proper signatures. This deed is between Lyman Robison, Theodore
130 C. Stebbins, Samuel J. Glover, and Harvey Howard, and is made to William F. Patrick and Frank J. Bowman for a half interest in the Col. Sellers and Accident claims. This deed was very adroitly drawn and does not state how much each one conveys, but the four first parties agree together to deliver a half interest.

On the 6th of November, 1882, a deed was filed, dated October 19th, 1882, and acknowledged the 20th, from Frank J. Bowman to William F. Patrick, which conveys all the interest in the Col. Sellers and Accident lodes of Bowman to Patrick.

Also on the 6th of December, 1882, a deed was filed, dated November, 1882, the date not given, acknowledged the 6th, which conveys from W. F. Patrick to John Livezey, Jr., one-sixteenth interest in the Col. Sellers lode and other property—that is, the Accident lode—and the consideration is stated to be $5,000.00. Now, with respect to this deed, it was given in the way of completing an arrangement which was entered into at the date of the making of the contract between Bowman and Patrick and the owners of the Col. Sellers and Accident mines. I do not know that there is any record of this agreement, but the transfer is referrable to that contract. One William H. Wilson acted as the agent between the parties—of both parties—to that contract. Messrs. Robison, Stebbins, and Wilson came to an agreement, which is of record, under which they paid Wilson for his services $2,500.00 or agreed to, and I understand that Patrick and Bowman on their part or Bowman alone agreed to give the said Wilson a one-sixteenth interest in the Col. Sellers and Accident lodes. I know nothing of this except from hearsay. Mr. Wilson soaked his contract with or sold it to Mr. Livezey, who was a pawnbroker here in town, and when I took an interest in the affairs of the Col. Sellers and Accident mines Mr. Livezey was paying the assessments demanded by this one-
131 sixteenth under the Bowman and Patrick contract. On the interest which he derived from Stebbins outside the contract he was not bound to pay any of the expenses. On the completion of that Bowman-Patrick contract and the transfer of his interest by Bowman to Patrick, Mr. Patrick made this deed to Mr. Livezey in pursuance of the agreement made with Wilson, who had sold it to him.

On the 10th of November, 1882, W. F. Patrick transferred to John

J. Simmons a one-sixteenth interest in the Col. Sellers and Accident lodes, and on the same date there is a deed from Joseph C. Whiting to William F. Patrick for one sixty-fourth interest in the Col. Sellers and Accident lodes. The consideration stated in my deed, according to the abstract, is one dollar. I got $687.50. I do not know what Mr. Simmons paid Mr. Patrick. I have already explained how this interest of mine is recorded as having been sold to Mr. Patrick. These are all the conveyances of which I am cognizant, and, except as to my own transfers, I do not know anything in regard to the considerations given or received. Beside these transfers there are certain certificates of levy, trust deeds, judgments, and transcripts of levy that go to make up the abstracts.

Cross-interrogatory 6th. Do you know the plaintiff, Frank J. Bowman, and the defendants, William F. Patrick and James M. Patrick, and have you any knowledge of the business transactions which took place between them with reference to the mining property before referred to? If so, state what said transaction was and whether from this transaction you have any reason to believe that any fraud or deception was practiced by the defendants or either of them with respect to the said Frank J. Bowman or his interests in said mines.

Answer. I was introduced to Frank J. Bowman by a party of railroad friends on the Missouri Pacific road somewhere be-
132 tween Topeka and St. Louis, a year ago last fall. This was the only time I have ever met him to speak to him. I have lived in St. Louis fifteen years and, of course, have heard of Frank J. Bowman. I lived near Grand avenue, on Chestnut St., while he resided on Olive St., near the same avenue. I have been acquainted with William F. Patrick since the year I bought into the Col. Sellers and Accident lodes. I never met James M. Patrick until last summer and I have seen him casually four or five times since. When Mr. Patrick and the owners with whom he had a contract on the Col. Sellers and Accident claims were at loggerheads with respect to the contract under which he had been working, and at the time the compromise contract was entered into which settled future conditions, Mr. Patrick told me that his brother, James M. Patrick, had acquired from Mr. Bowman, as I remember, a one-twelfth interest. We were attempting to fix William F. Patrick's status under the new contract when this relationship was communicated to me. Further than this I only know that at the time of the making of this contract with William F. Patrick I was satisfied from the showing that was made that, so far as Mr. Bowman was concerned, he had withdrawn from the enterprise which had been conducted to date by Mr. Patrick for himself and Mr. Bowman on the Col. Sellers and Accidents claims. It was a matter of considerable importance to us and, I think, it was generally agreed that, in view of the documents which passed around from hand to hand at that time, Mr. Patrick would become the owner, through Mr. Bowman's voluntary tenders, of all the interest which was to accrue to them under their joint contract with the original owners. This compromise contract was drawn up in the office of J. B. Bissell, an attorney. The letters (I think they were letters) of Mr. Bowman were scrutenized and

read, and we were advised that, under the same, Mr. Patrick
133 would proceed to accept Bowman's offers; in fact, that they had been accepted, and that there was nothing to do but for Mr. Patrick to see Mr. Bowman, get his deed, and complete the transaction. I know of no sort of deception practiced by the defendants or either of them.

As I have said, Mr. James M. Patrick's connection with the business of the Col. Sellers and Accident lodes, so far as myself and other owners were concerned, was never apparent. I may almost say that I know nothing about him in the case whatever. Myself and the other owners of the mines have always dealt with W. F. Patrick, and, when entering into our arrangement under our agreement with Mr. Patrick, excepting to myself, I do not know that Mr. Patrick imparted any information concerning his brother. I know that for nearly three years I never mentioned to any one that I knew or believed that Mr. Patrick's brother, James M. Patrick, was interested with us. We were in Judge Bissell's office attempting to adjust differences. We only wanted a fair adjustment. We had no prejudices one way or the other with respect to Mr. Bowman or Mr. Patrick. As the matter was presented to us we proceeded to formulate an agreement. We acted cautiously and carefully and with the best light we had. I have a copy of that contract somewhere, but it must be at my home in St. Louis, filed away among papers which I had thought I would never again have occasion to refer to. Had we believed any fraud or deception had been practiced that contract never would have been made. In the very nature of the case it would have been impossible to make it. Had we not been satisfied that Mr. Bowman was no longer a party with whom we would have to deal we would not have dealt with Mr. Patrick as we did.

Cross-interrogatory 7th. Are you an experienced miner and well acquainted with mining properties, their value, develop-
134 ments, and differences of working? If so, how long have you been giving attention to this matter and what experience have you had with respect thereto?

Answer. As to whether I am an experienced miner and well acquainted with mining properties, their value, etc., I can only say that while I am such a man with respect to Leadville and her surrounding camps, I do not know but that I would be all at sea in some other mining community. There are mines and mines. I might be a judge and a good judge of the mining property in this section, and a very poor judge of a mine or a prospect in some other section. I think I know something of the difficulties of working mines everywhere, and I have learned this perhaps entirely by giving my attention to what I have had in hand during the last six years. I went over to Utah last year for some St. Louis friends and took the general management of two mining properties in a country in which I was entirely unacquainted, and in one of those properties which had been worked for fifteen years by some of the best and largest operators on the coast, and which they sold for a nominal price because it had played out on their hands, I made a good suc-

cess. The property cost $14,000.00 and I made it pay all the expenses of new developments, took the purchase-money out of it in a month and a half, and left it paying $10,000 to $12,000 a month. The other properties, which consisted of many old mines thrown together, after long abandonment I brought up to a point where the output equaled the expenses. I was offered the charge of a third property for which a large sum of money had been paid, but refused to risk what little reputation I had by taking hold of it. Immediately upon my withdrawal from the field this last property and the second was shut down. A man must be something more than a miner and a judge of mining properties to make a mine pay. He must be thoroughly conversant, not only with the character
135 of the ore with respect to the values it carries, which don't consist altogether in the amount of gold or silver or precious metals which they bear, but on their character as smelting ores, but also he must know his markets and in general be a good business man. I have given attention to mining altogether for six continuous years, and further I have nothing to say on this point.

Cross-interrogatory 8th. If you- answer to the last question is in the affirmative and shows yourself an experienced miner or mining engineer state whether or not the value of a mine or prospect while still undeveloped is or is *it* not an extremely difficult matter to determine, and is not one in which the opinions of different persons may and do usually widely differ.

Answer. As a general proposition I would state in answer to this question that I am one of those who have come to the conclusion that the poorest judges of prospects and mines are the so-called mining engineers. I would give more for the judgment of a practical miner, who has nothing but his years of labor underground to direct him, than I would for all the reports of the average mining expert. Any one who has had as little experience as I have, as well as those who have had a great deal more, I think would be willing to testify, if called upon to do so, that there is nothing more difficult than to determine what a prospect bids fair to develop into or what the value of a mine may be. It is, indeed, an extremely difficult matter to determine. The best judges make mistakes, and I have found that the man who has nothing but his enthusiasm or his necessities to keep him at work in a hole that he can get no one to look at makes often a bigger success than all the information, knowledge, and experience that can be brought to bear upon
136 the difficult proposition. Opinions do widely differ. They are often wrong, and during the progress of a mine's development they will change almost as frequently as the character of the rock. A little indication sometimes gives great encouragement and a large body of ore sometimes brings great disappointments. Good mines are rare. One of the best judges of mines on the Pacific coast, who has made his large fortune in the pursuit of mining industry, holds that a mine that will not pay under any management is unworthy of the name of a mine. Now, such mines are hard to find and, of course, when found do not need any experting; they speak for themselves.

Cross-interrogatory 9th. In your experience and observations as a mining man, with respect to undeveloped property and the sale of interests therein, is it or is it not a fact that such mines, properties, or interests will, as regards their market value, vary greatly in prices, even within very short periods of time, because of momentary indications of value, excitement in mining circles, exag-eration or depressed opinions and like causes?

Answer. I think I have already sufficiently set forth my answer to this question in my previous answers, and I do not know that there is anything further to add in the way of an answer here.

Cross-interrogatory 10th. Is not the difficulty of ascertaining the exact value of a prospect or undeveloped mine so great as to make such value almost entirely a matter of opinion?

Answer. There is no way to ascertain the exact value of a prospect or undeveloped mine. Exact values do not pertain to such a thing. No two men, I would agree to say, would agree as to the value of a prospect or as to the value of an undeveloped mine.
137 Where everything is problematical there cannot be much exactness. A man may have an opinion of either a prospect or of an undeveloped mine. He may predict something of its value from his experience or may allow the situation of the prospect or the mine, with respect to neighboring mines, to enter into his calculation as to the value of it; but, after all, whatever his conclusion may be it must simply be an opinion, which may or may not be justified by subsequent developments. The history of mining shows that many fortunes have been sunk upon the mere opinion of the party who has spent his money. There is nothing exact as to values even in a mine after its development except the cold facts set forth by the ore returns and the other facts set forth on the other side of the account in the way of expenses. This very camp affords the best illustration of the truth of this opinion.

Cross-interrogatory 11th. Re-examine your answers to the direct interrogatories propounded to you by the examiner and state how much of your answers is known to you directly from your own personal knowledge and how much thereof have you learned simply from the statement of other persons.

Answer. In answer to this question I will state that I do not believe it will be necessary to examine my testimony to the direct interrogatories, but I will do so, and if I think it necessary will amend the answer which I now make to this question. I have given my testimony, as far as I could, keeping the subject-matter carefully before me. I have endeavored to set forth what I knew of my own personal knowledge mainly, and wherever I have stated anything as coming from other persons I have tried to be careful to so state. After carefully examining my answers to the direct
138 interrogatories as required by cross-interrogatory 11th I am unable to discover any necessity for any restatement of what I have said. I believe I have in every case set forth the source of my information, and that I have not stated as of personal knowledge anything that has come to me from other parties or from any source not directly personal.

Since July, 1882, there has not been a great deal done in Col. Sellers' affairs that I have not been personally cognizant of and a part of. Its business has been my business; its history has been a part of my history, and its many difficulties have been to me a constant study.

Cross-interrogatory 12th. Re-examine the 17th direct interrogatory propounded to you and state whether there is anything further in your knowledge which can be added to your answer to that question; if so, state the same fully.

Answer. In answer to this question perhaps it will be well for me to state that during the progress of our development of the mines since known as the Col. Sellers, and while we were worrying through our difficulties, I was offered many interests at varying prices, and when I was more fully cognisant of the terms and conditions on which I was offered these interests than I am now I made a calculation which presented to me these facts: That I could have secured for less than $10,000, and carried to pay, one-third and one one-hundred and ninety seconds more than one-third of the Col. Sellers and Accident claims. Mr. Patrick offered me the Bowman interest, under his offers from Mr. Bowman, or all that remained of that interest, which was five forty-eight-s of the whole property, for the amount of money, as near as he could figure, that he had spent up to date of his offer upon that interest under his contract, and I declined the offer. The sum asked was $2,300.00, and this was
139 about the time of our entering into the agreement with Mr. Patrick; and after we had struck ore—even after we had shipped ore—new difficulties arose concerning the management of the property, and our views were so divergent that J. J. Simmons, who was then here in the camp, left it precipitously and gave authority to Mr. Stebbins, having failed to find me before his departure (as he afterwards told me he had sat around the office of the Clarendon hotel for a half hour, hoping that I might show up)—and with Mr. C. L. Hill, who was then and is still manager of the Catalpa and Crescent mines and one of his old-time associates—to sell his one-eighth interest (for half of which he had paid, according to the abstract, $2,600.00) for $5,000.00. Time and time again efforts were made by various owners to sell interests in the property. Efforts were made to borrow money on interests in the property and failed, and as a matter of fact the parties holding adversely, which parties I have called the Little Hope party, or jumpers, were considered by the camp at large to have the better title. They were a strong, influential gang, controlling politics and almost controlling public opinion. I did not care to increase my interests and the records show that notwithstanding I could have secured, as I have testified, more than one-third of the property for a sum of money less than $10,000, I did not do it. But this was a calculation I made after our troubles were finally ended, or our more serious ones, and was in the nature of a hindsight rather than a foresight.

At the hour of five o'clock p. m. the taking of testimony was adjourned to May 20th, at two p. m.

MAY 20TH, AT TWO P. M.

J. C. WHITING resumed:

(Continuation of same interrogatory:) As I understand this question, it calls for a revision by me of testimony here-
140 tofore given, and, the same not having been written out by the stenographer, it is impossible for me to make an examination, and therefore I prefer not to proceed until it is extended, so that I can examine it.

Whereupon the taking of testimony was adjourned until May 21st, at two o'clock p. m.

May 21st, A. D. 1887, at the hour of two o'clock p. m., the taking of testimony was resumed.

J. C. WHITING:

The re-examination of testimony heretofore given by me, demanded by the question submitted, I have not been able to make, and as a party wholly disinterested in these proceedings, and in a position such that, whatever their result, I cannot be affected by it, I propose, if it be admissible under the rules governing the taking of this testimony, to review and re-examine what I have stated, and while I am pretty certain I have not misstated anything I wish to be satisfied in making my concluding answer that I have been perfectly clear and accurate all through, and the reason why I have not been able to examine and read said testimony is because the testimony as taken in short-hand has not yet been transcribed.

Whereupon the taking of testimony was adjourned until May 23d, at two o'clock p. m. of said day.

May 23d, at two o'clock p. m., the witness, Whiting, not appearing, the taking of testimony was adjourned until May 24th, at ten o'clock a. m.

May 24th, at ten o'clock a. m., the witness not appearing, the taking of testimony was adjourned until May 26th, at two o'clock p. m.

May 26th, the witness, Whiting, not appearing, the taking
141 of testimony was adjourned to May 28th, at two o'clock p. m.

May 28th, A. D. 1887, at two p. m., examination resumed.

J. C. WHITING:

Since my last appearance I have carefully reviewed the testimony I have given in answer to direct question No. 17, and I do not know that there is much to add to it for the benefit or advantage of either of the parties in this cause, or that is very material to the subject-matters in question; but I would like to add in the way of explaining my persistency in the cause of the Col. Sellers' owners, as I have tried to set it forth in my answers, that it was urged on by the peculiar relations in which I found myself with respect to the parties opposing me. In contending for the mastery over them in the Col. Sellers Little Hope controversy, I was in a measure protecting myself in other mining claims, in which I had much larger interests than

I had in the Col. Sellers, against the same parties. I had, in 1881, interested myself in some mining claims with parties, one of whom I have mentioned as the recorder of Lake county, and of whom the other was I have mentioned in my testimony as having sunk, under contract, most of the Little Hope shaft, and I had become involved in that year with these parties in a very bitter controversy. I felt that the two parties mentioned had deliberately swindled me, and, in 1882, when I returned to Leadville my contention with the said parties was resumed and continued. It was necessary for me, in order to succeed in my first mining venture alluded to, to cripple my opponents if possible, and I am free to say that one of the principal inducements which lead me into the Col. Sellers deal was my determination to show these parties who had taken advantage of my ingenuousness that I was fairly able to take care of myself.
142 And this short story may help to explain why I worked so hard and got so little so far as the Col. Sellers mine is concerned. I am now the owner of three-fourths of the mining claims into which I originally ventured, and possibly out of them may yet be remunerated.

1st redirect interrogatory. If in your answer to the 3d cross-interrogatory you say you heard or knew of the discovery of ore in the mines referred to before Oct. 19th, 1882, then state when you first heard of the first discovery of ore in the "Col. Sellers" shaft, & from whom & when and where you first saw the ore first discovered in that shaft.

Answer. I have stated in answer to the previous questions that on the 13th of August, 1882, I was at the Col. Sellers shaft and made a memorandum to the effect that on that day we had uncovered something which appeared like the top of a mineral chute and resembled blue tale or decomposed ore, just which I was unable then to determine, and that I had assays made upon the same and found that it carried no value. Now, just when this discovery became valuable—that is to say, at just what date we reached mineral by following down upon this chute—I am not able to state, but I can say this: that when I first saw the indications they were, as I have previously stated, in the south face of the Patrick shaft, and covered a spot as large as my hat; that I followed developments closely day by day; that in the course of a couple of days the black spot had extended until it covered the shaft on the south side, running across it from east to west; that as it was still further followed it made its appearance in the bottom of the shaft and extended up into the east and west sides of the same, and that it continued to enlarge and expand until it showed a considerable vein on both the east and west sides, and continued with us for a distance of about
143 fifteen feet down from where it made its first appearance, and that at about this distance it disappeared from the shaft on the north side. At this juncture I remember two or three of us went up to the shaft, descended the same, and took council at the bottom thereof as to what we had better do—should we continue the shaft straight down or should we make a bend in it and follow the ore? We finally concluded that we would continue the shaft

straight down, which being done at a distance of a few feet—as near as I can recollect at this late day not over ten or twelve feet—we struck ore—solidly penetrated it about two feet and then had to stop, owing to the heavy influx of water. I do not remember of taking any samples after those which I have mentioned until we had reached what it was evident to all of us was the main ore body. From that main ore body I took some few samples and had the assay values determined. The highest assay I got was forty-four ounces in silver. The percentage of lead I do not remember. Whether forty-four-ounce ore of the character such as we had would pay to mine was a question which I could not then very well determine. No such ore was on the market in this district. As I have stated, there was no smelter in Colorado prepared to properly treat it and the information necessary to determine the value of the ore struck was not to be collected without a good deal of difficulty. Knowledge on this point came later on. It came only after the smelters themselves had had a chance to analyze the ore and judge of its character. I will add here that when in March, 1883, having conquered the water, we were able to make our first shipment, we received in return for the same per ton $5.35. The treatment charge on this lot was $15.00 per ton, a price which was immediately raised to $16.50, then to $17.00, then to $18.00, afterwards to $21.50, and to this latter price a contract clause was added, which took
144 into consideration the zinc which the ore contained, a fact *or* which cut no figure in the earlier prices, and as this zinc constituent in our ores was hardly less than twenty per cent. this "zinc clause" made an addition to the working of $21.50 of the further sum of $4.00, or fifty cents per unit (by which is meant per cent.) for every unit above twelve which the ore carried.

2d redirect interrogatory. If, in answer to 6th cross-interrogatory, you state that you have any knowledge of any business transaction that took place between Frank J. Bowman and Wm. F. Patrick & James M. Patrick relating to the mining property referred to, then state when, where, from whom, & in what manner you obtained such knowledge, & who were then present beside yourself.

Answer. In answer to this question I will state that I have nothing to add to my answer to the 6th cross-interrogatory, except that it may be relevant to mention that the parties present when the compromise contract was made with Mr. Patrick, and who were interested with me in knowing what was the status of Mr. Patrick under the original Bowman-Patrick contract at that time, and who I have stated were, with me, satisfied from the showing that was then made by Mr. Patrick that Mr. Bowman had voluntarily tendered all his interest to him. The parties, as far as I can recall them, were T. C. Stebbins, Lyman Robison, and John Livezey, Jr. J. B. Bissell was present as Patrick's attorney, and the papers which were shown to us were in Mr. Bissell's possession. Just what those papers were, or in just what form they were, whether private letters or something other than that, I cannot now remember.

Recross-examination:

1st recross-interrogatory. When you first heard of the dis-
145 covery of ore in the "Col. Sellers" mine, or when you first saw such ore, what was its quantity, nature, value, & character?

Answer. I think I have been pretty explicit upon all the points questioned in this interrogatory. I have stated the day when the very first indication of anything like a mineral vein or chute was to be seen in the Patrick shaft of the Col. Sellers mine, and in answer to my previous questions I have detailed the course of the mineral chute upon which that shaft struck in its progress. So far as I could I have defined its character, and I have given, I believe in full, all that I know of its nature and value.

And further witness saith not.

JOSEPH C. WHITING.

Subscribed and sworn to this fifteenth day of June, A. D. 1887. Before me—

ROBERT H. BUCK,
Special Commissioner.

UNITED STATES OF AMERICA,
State and District of Colorado, } ss:

I, Robert H. Buck, designated in the foregoing commission as a special commissioner to take the testimony of Joseph C. Whiting, a witness on the part of the plaintiff in the cause now pending in the circuit court of the United States within and for the eastern district of Missouri, wherein Frank J. Bowman is plaintiff and William F. Patrick *et al.* are defendants, do hereby certify that before the commencement of the taking of the foregoing testimony he, the said witness, Joseph C. Whiting, was by me duly cautioned and sworn to testify the whole truth touching his knowledge of anything relating to the said matter in controversy between the said parties; that the examination of said witness was taken by me and in my
146 presence reduced to writing, and that after the same had been so taken and reduced to writing it was read over by the said witness in my presence and was thereupon by him subscribed and sworn to in my presence between the hours of nine o'clock in the forenoon and six o'clock in the afternoon of the fifteenth day of June, A. D. 1887, at the city of Leadville, in said district of Colorado.

I further certify that the place of residence of said witnes- is the city of St. Louis, in said eastern district of Missouri, though he is temporarily commorant of said Leadville.

Witness my hand, at said Leadville, this seventh day of June, A. D. 1887.

ROBERT H. BUCK,
Special Commissioner.

Fees.

Swearing witness	$ 10
296 folios, at 20c.	59 20
13 days' attendance, $5	65
Paid by plaintiffs	$124 30

In the Circuit Court of the United States for the Eastern District of Missouri.

FRANK J. BOWMAN
vs.
WILLIAM F. PATRICK *et al.*

Testimony taken before L. L. Walbridge, special examiner in the above-entitled cause, under appointment of the circuit court of the United States for the eastern district of Missouri, at the office of R. S. McDonald, February 17th, 1887, at 3 p. m.

Present: On behalf of the plaintiff, R. S. McDonald and F. J. Bowman, Esq.; for the defendants, E. C. Eliot, Esq., and Edward Cunningham, Jr., Esq.

147 E. C. ELIOT, being called as a witness on behalf of the plaintiff, testified as follows:

(By Mr. BOWMAN.)

Q. Your name is E. C. Eliot?
A. Yes, sir.
Q. What is your business?
A. I am an attorney-at-law.
Q. You are attorney for the defendants in this case?
A. Yes, sir.
Q. When did you last see William F. Patrick and where?
A. I saw Mr. Patrick within a few days.
Q. When and where?
A. In my office.
Q. When?
A. I am trying to think of the day. It was, I think, Monday or Tuesday, but I can't remember positively.
Q. Of the present week?
A. Yes, sir; to-day is Thursday. I think it was either Monday or Tuesday.
Q. Think a moment. Wasn't it Monday, and didn't he leave for Chicago on Monday night?
A. I can't say.
Q. Did he inform you where he was going?
A. No, sir; he did not.
Q. Have you heard from him since?
A. I do not know that these questions are relevant, but I will answer them. As far as communications might be concerned to me, they are privileged communications.
Q. I do not want any privileged communications, but do you know of your own knowledge or information where he now is?
A. I think that would be a privileged communication, but I will answer it. I do not and have not any information.
Q. Have you any information as to whether he is or is not in the city of St. Louis at this time?

A. I believe that he is not, but I have no information on that subject one way or the other.

Q. Have you any information as to where Mr. Patrick now is?

148 A. You asked me that once before.

Q. What is your answer?

A. My answer is no.

Q. Have you any knowledge or information as to whether Mr. Patrick has been here since Monday last?

A. No, sir; excuse me; I wish to qualify that by saying I wasn't sure, as I answered as to whether it was Monday or Tuesday of this week that I saw him, but I think it was one of those two days.

Q. Can you refresh your recollection and tell me whether you saw William F. Patrick in this city on Monday or Tuesday last?

A. I think I could by looking at the books.

Q. Won't you do so, as I wish to fix the date positive as to when it was?

A. Now?

Q. Yes; it is important for us to fix the date when he was here.

A. I would have to go to my home to do it.

Q. Can't you fix the date without going to your residence?

A. It would be extremely difficult for me to do so. My recollection is it was only a very few days ago, but I can't say certainly what day; let me think a moment and I will try to recollect. I think it was Monday

Q. Can you recollect your different engagements, in what courts you have been? As this is Thursday, can't you recollect since Monday so as to positively fix the date when you saw Mr. Patrick in St. Louis?

A. I recollect I was about to go to court to try a case when I saw him. Unfortunately, that same case has been set for 10 o'clock every day this week, so that I am not able to state certainly which day it was, but I think it was the first setting of the case, which was Monday.

Q. That is your best recollection?

A. Yes, sir; that is my best recollection now.

Q. Do you know whether he registered at any hotel on that occasion here in the city of St. Louis?

149 A. Of my own knowledge I do not.

Q. Have you any information on that subject?

A. I decline to give any answer. As his attorney I object to information in the nature of hearsay on the subject.

Q. If he did register at any hotel when he was here on Monday last, will you state the name of the hotel in which he was registered?

A. That question necessarily follows the other.

Q. We insist on an answer.

A. I do not know, Mr. Bowman, that he registered at any hotel.

Q. Did you see him at any hotel?

A. I did not.

Q. Where did you see him?

A. At my office.

Q. Who else was present?
A. My office boy, and I think some client came in who didn't know him.
Q. Any one else present that knew him?
A. I think not.
Q. What time of day was it?
A. Just before 10 o'clock.
Q. Do you know whether he has been to Chicago since that time, or have you any information on the subject?
A. No, sir; I have not; I have no knowledge on the subject.
Q. You have no information where he now is or can be found?
A. I have none.
Q. You are associated with Mr. Cunningham in this case, are you?
A. Yes, sir.
Q. Is Mr. Burnett counsel in this case?
A. I do not know any such man, sir.
Q. You know of no counsel in the case except yourself and Mr. Cunningham?
A. Yes, sir.
Q. Who?
A. Mr. Parsons, at Leadville.
Q. Any one in St. Louis?
A. No other in St. Louis.

Mr. BOWMAN: That is all.
WITNESS: I have no questions to ask myself.

150 THOMAS WARD MCMANUS, of lawful age, being produced, sworn, and examined on behalf of plaintiff, testified as follows:

(By Mr. BOWMAN:)

Q. Mr. McManus, I wish to ask you where you have been the last week.
A. You mean in the city?
Q. Have you been in the city during the past week?
A. Not all the time.
Q. Where else?
A. I have been out of the city.
Q. At what place?
A. Well, I was in Iowa.
Q. Anywhere else?
A. No, sir. Well, I was on my way from here there and there back.
Q. Were you aware a subpœna was issued against you to appear here and testify before the examiner of the United States court?
A. When?
Q. During the past week.
A. This week?
Q. The past week.
A. You mean last week?
Q. Yes.

A. Yes, sir.
Q. Wasn't that subpœna served upon you?
A. Yes, sir.
Q. Didn't you leave the city?
A. Yes, sir.
Q. Why? Wasn't it because you didn't wish to testify?
A. Yes, sir.
Q. You are a connection of Mr. Patrick, are you not?
A. I am; one of them.

Mr. BOWMAN: I wish to lay my preliminary to ask leading questions.
Mr. ELIOT: Of an adverse witness?
Mr. BOWMAN: Yes.

Q. Which one?
A. That is James M. Patrick.
Q. What connection?
—. He is a brother-in-law of mine by marriage.
Q. How long have you been acquainted with William F.
151 Patrick, one of the defendants in this case?
A. I don't remember that.
Q. A number of years?
A. Yes; a good many years.
Q. How long have you been connected—how long have you known James Patrick, the other defendant?
A. I don't know just exactly how long.
Q. Do you know where either of them now are? Have you any information on the subject?
A. No; I can't say that I have.
Q. When did you last see either of them?
A. I think it was in October; some time along about October.
Q. Have you at any time ever received any letters from either of them relative to the Col. Sellers mine, the property here in dispute?
A. From them?
Q. Yes; or either of them.
A. No, sir; I have not.
Q. Have you at any time seen or have you in your possession any writing or memorandum tha- relates to the Col. Sellers mine in the handwriting of either of them?

Mr. ELIOT: I object to that.
Mr. BOWMAN: I insist on an answer and expect to prove such memorandum made by them is relevant to this case.

(Last question repeated.)

A. Yes, sir: I have.
Q. Have you such memoranda or writing under your control where it is accessible to you or you could produce it at this time? Is it in any safe, desk, or elsewhere where, if you were disposed so to do, you could here produce it?
A. Yes, sir.

Q. I wish to ask you further, have you at any time seen or has there at any time — addressed to you or have you in your possession or under your control any letters or papers signed by any person or persons, male or female, acting as professed agents of either William F. Patrick or James M. Patrick under your control or where you could produce them, if you were disposed to do so?

152 Mr. ELIOT: I object to the question as immaterial and incompetent.

A. Yes, sir; I have.

Q. I now request of you to here and now produce such papers.

A. That means you want me to go and get them.

Q. I do. I wish the stenographer to take down what I say so that the thing shall be right on the record to the court. I wish to notify you that we will give you an opportunity to confer with your counsel as to whether you are compelled to produce such papers, and to notify you that we shall take proper process at your expense if you do not produce them at this examination here and now (take down what I say), and I am willing to suspend the examination to give you an opportunity to confer with your counsel whether you will comply with that request or take the chances and expenses which will be entailed on you if you don't produce them.

Mr. MCGINNISS: Let us adjourn until some time to-morrow.

Mr. BOWMAN: No; I insist on going ahead now. I am willing to wait for 30 minutes for a determination whether he will or not, and will furnish a carriage to get them. Otherwise I will give notice that I shall apply to Judge Treat in these matters for an order, because I do not propose to give an opportunity for any papers to be made away with.

Mr. MCGINNISS (to the witness): I will advise you not to produce any papers this afternoon. To-morrow we will settle that question. In other words, we will settle this afternoon what we will do to-morrow.

Mr. BOWMAN: I will give notice that I will now instanter apply to Judge Treat for an order to have these papers produced.

Mr. ELIOT: I think under the rules of the United States court one day's notice must be given.

Q. Are not these papers where it is in your power within
153 the next hour to produce them?

A. I leave that to Mr. McGinniss.

Q. You are required to answer the question.

Mr. MCGINNISS: I instruct you not to produce any this afternoon.

Q. I ask whether it is not in your power in one hour to produce those papers.

A. That depends on a good many things.

Q. But you can tell whether you can produce them in an hour? Are these papers where you can get them?

Mr. MCGINNISS: Suppose he goes and gets them and brings them to us if he can.

Mr. BOWMAN: I wish the last question repeated.

(Question repeated.) Are not those papers where it is in your power in the next hour to produce them?

A. They are.

Q. Will you do so?

A. I will, as soon as I can get back from where they are.

Q. Will you attempt to do so without further process if an adjournment is taken for one hour for an opportunity to do so?

A. Yes, sir.

At this point a recess was taken for one hour.

At the expiration of the recess the examination was resumed as follows:

(By Mr. BOWMAN:)

Q. Mr. McManus, have you the letters to which your answer referred?

A. Yes, sir.

Q. If you have any in the handwriting of Mr. James Patrick or William Patrick or any memorandum made by them in their handwriting concerning the Col. Sellers mine, which is the subject-matter in dispute, will you produce it? I will say in this connection that a suggestion has been made that these papers have been presented to be simply identified and left with the examiner for inspection of the parties. I am willing to accede to that
154 proposition.

Mr. MCGINNISS: Left with him as an individual, not as an officer.

Mr. BOWMAN: I am willing to agree to that.

Mr. ELLIOT: We do not object or consent.

Q. Will you produce those papers?

Mr. MCGINNISS: I instruct the witness to produce them.

(Papers were produced.)

Q. In whose handwriting is this document dated St. Louis, October 27th, 1882, which has been identified as No. 1, and whose signatures are thereto attached?

A. James M. Patrick and Thomas Ward McManus.

Q. Are you familiar with those signatures?

A. Yes, sir.

Q. In whose handwriting is the body of the instrument?

A. James M. Patrick.

Q. One of the defendants in this case?

A. Yes, sir.

Q. At what time did that come to your possession?

A. The day it was written.

Q. How?

A. The day or the following day. It was written, I think, the same day.

Q. Where?

A. At my residence.
Q. In St. Louis?
A. Yes.
Q. Look at this letter marked No. 2, dated in Knoxville, August 21st, 1882, and state in whose handwriting it is and by whom it is signed.
A. This is Annie Patrick.
Q. You know the handwriting?
A. Yes, sir.
Q. And the signature?
A. Yes, sir.
Q. When did that come into your possession?
A. Some time ago.

Mr. McGINNISS: Who is Annie Patrick?
WITNESS: Wife of William F. Patrick.

Mr. McDONALD: When you speak of the Patricks always
155 speak of James M. and William F., so as to know which one is alluded to.

Q. In whose handwriting is the paper I now produce to you marked No. 3, bearing date Bradley, August 20th, 1882?
A. That is James M. Patrick.
Q. Was it received in the envelope that I show you?
A. That is where I got it out of.
Q. In whose handwriting is this No. 4 that I produce, dated Leadville, October 29th, 1882?
A. That is William F. Patrick.
Q. And when did that come to your possession?
A. At the same time I got the other, with the exception of the bet one. They all came into my possession at the same time.
Q. When was that?
A. It was after I filed the will of my sister.
Q. Now, don't you think you have one other letter relating to this mine written by any person in your possession or under your control other than the four that we have read?
A. I do not know what I have got.
Q. Will you look over your papers without any special order, so as to be able to state to us to-morrow?
A. No; I won't. I am busy to-morrow.
Q. So as to be able to state to us by Saturday at 3 o'clock what other papers you have?
A. I don't know as I can then; I will be busy.
Q. Say by Monday at 3 o'clock?
A. My God, what more do you want, man?
Q. I want what you have pertaining to the Col. Sellers mine.
A. I don't know whether I have got any or not.
Q. I ask if you will look all over that you have and see if you have any other papers or letters written by any parties.

A. My time is money and I don't want to look over a lot
156 of papers.

Q. Now in your possession or control relating to the Col. Sellers mine?

A. I will say this, that I will look over the papers, but I do not know that I can look them all over.

Q. What is your recollection, that you have more papers that relate to the Col. Sellers mine?

A. I don't know. I have not looked at them, I told you; I have not looked at them.

Q. You can tell by looking?

A. I suppose any man can do that.

Q. What I wish to understand is whether you will, after advising with your counsel, produce such letters or papers of any kind of description relating to the Col. Sellers mine as you may have under your control, in your possession, or accessible to you?

A. Yes; all that I find during that time I will. I will here say that I don't think I can look them all over by that time.

Mr. BOWMAN: I am through with the witness.

Cross-examination by Mr. CUNNINGHAM, counsel for the defendant:

Q. Will you let me see the paper marked No. 1? (Paper produced.)

Q. I understand you to say that this paper marked No. 1 was received by you from James M. Patrick on or about the day of its date?

A. Yes, sir.

Q. Now, the others, please—No. 2 first. I will ask you how this paper No. 2 came into your possession.

A. It was in the house—our house.

Q. Was in your house?

A. Yes, sir.

Q. Where was it in your house?

A. In the attic.

Q. In what condition or place in the attic?

A. Among my sister's goods.

157 Q. Was this one of the papers left by your sister in the house at the time of her death?

A. Yes; along with her goods, understand.

Q. Well, tell me what sort of a package or receptacle was the letter contained — when you found it.

A. That I am not positive; it was along with the bundle of letters that I got out of a box.

Q. What sort of a box?

A. It was a common wooden box.

Q. A dry-goods box or a sort of a cabinet?

A. Oh, no; a wooden box for packing.

Q. Had a top?

A. Had a top.

Q. Had it a lock?

A. Oh, no.

Q. Do you know how it came to be there?
A. Yes.
Q. How?
A. I say this—I mean this, that they were left there by my sister in the house. That is the way I know they came there.
Q. Will you tell me whether this letter was or was not discovered by you at the time when as executor of your sister you made an examination of her papers?
A. It was about that time.
Q. Was it discovered by you in the course of that examination?
A. Yes, sir.
Q. What did you do with the other papers besides this No. 2 that you found in that box?
A. I have them.
Q. Where?
A. At my house.
Q. In what place?
A. They are locked up.
Q. In what place?
A. In my room.
Q. In what place?
A. I say in my room.
Q. In what place in your room?
A. In my closet.
Q. Are there many such papers?
A. Like that you mean?
Q. Are there any other papers than those which you found in that box at that time and which you now have in the closet
158 in your home?
A. Yes, sir; there is a good many.
Q. Will you give me the general terms or character of those papers?

Mr. BOWMAN: I object to that. I do not want to go into family affairs. If this counsel have ulterior objects to accomplish I do not want to go into them, and this cannot be made a drag net for other private affairs, and I don't propose to be chargeable in taking this deposition to enable these gentlemen to take their depositions in other matters. I understand the parties have suits to break wills and I don't want this examination to be made a vehicle for that sort of thing.

WITNESS: I refuse to answer.

Q. Will you now let me see the paper marked *Bo.* 3? (Paper produced.) When and in what manner did this paper marked No. 3 come into your hands?
A. In the same way.
Q. As what?
A. As the other one.
Q. As No. 2 did?
A. Yes.

Q. That is to say, you found it in the box in the garret at your house with other papers of your sister, Mrs. James M. Patrick?

A. That is the way I found it.

Q. Has this paper No. 3 been in your hands ever since you found it at that time and place?

A. Yes, sir; not in my hands; I don't say that, as I went after it—you asked me, in my hands.

Q. Where did you go after it?

A. To my house.

Q. Has it at all times since you first discovered it been in your hands or else in your closet at home?

A. It has been in my possession.

Q. And has been in the hands of no one else?

A. No, sir.

Q. Have you ever before to-day exhibited it to any one?

A. Is that a competent question?

Mr. McGinniss: You can answer that question as far as
159 I am concerned.

Mr. Bowman: I object to that unless it is some one connected with this case. What their family affairs have been or who he has talked with about that is immaterial.

Witness: I refuse to answer the question.

Q. Have you ever before to-day shown this paper to Mr. F. J. Bowman, the plaintiff in this case?

A. I have not.

Q. Have you ever shown this before to-day to Mr. R. S. McDonald?

A. I have not.

Q. Have you ever shown this paper before to-day to any attorney or party to this suit of Bowman against Patrick?

A. Shall I answer the question?

Mr. McGinniss: Yes.

A. I am not positive. I believe Mr. Price has seen it.

Q. When do you think Mr. Price saw it?

A. About 10 days ago.

Q. Is it your recollection that Mr. Price never saw it before 10 days ago?

A. Yes.

Q. When, for the first time, if ever, did you give any information to any of the parties or to any of the attorneys in this suit that you had any such letter in your possession as either this letter No. 3 or the letter No. 2 or the letter No. 4?

Mr. Bowman: I object to the question. It has nothing to do with the validity of the letter or the effect of the letter, and has only to do with their own family affairs. It is not material to the case at all, and if we are led into other matters that have nothing to do with this case relating to their family differences it is wholly immaterial. I therefore object.

Witness: I refuse to answer the question.

Mr. BOWMAN: I hope you will answer the question if you
160 have no objection. I wish you to answer the question and I will withdraw the objection.

A. I don't think I ever gave them any.
Q. Are you positive that you never did?
A. That is my recollection.
Q. Are you positive that you never did?
A. I say that is my recollection.
Q. Can you state whether you are positive about it, or that it is merely your recollection?
A. If I was positive I would answer that way; I told you that is my recollection.
Q. Then you are not positive about it?
A. I am not positive, but I don't think that I did.
Q. What, if any, conversation did you have with Mr. Bowman or with Mr. McDonald about the bringing of this suit of Bowman against Patrick at the time that it was brought?
Mr. BOWMAN: Was Mr. McDonald at any time your attorney?

A. Yes.
Mr. BOWMAN: Then I wish the witness to be notified that he need not state any communication between himself and his attorney if Mr. McDonald was his counsel in any matters of their family affairs at the time he made such communication. I wish the witness to know he is not required to state any communication between him and counsel, R. S. McDonald, if Mr. McDonald was his counsel—if family differences were going on then and Mr. McDonald was his counsel.

WITNESS: I refuse to answer the question.

Q. You refuse to answer the question?
A. Yes, sir.
Q. Will you give your reasons why you refuse to answer it?
A. Well, he was my attorney at that time.
Q. He was your attorney at the time when he brought this suit, was he?
161 A. He was my attorney at that time that he brought this suit.

Mr. BOWMAN: In what suit?
A. In the *habeas corpus* proceeding.
Q. What, if anything, had this suit to do with the *habeas corpus*, as far as you know?
A. I don't know of any.
Q. Was Mr. McDonald your attorney in the bringing of this suit of Bowman against Patrick?
A. Oh, no; no, sir; you know that without asking me the question.
Q. Then why do you say that you object to answering the question which related to conversation between you and Mr. McDonald about this suit on the ground that he was your counsel?

Mr. BOWMAN: I object to the question as already answered. He has stated whatever conversation he had he had with Mr. McDonald as an attorney in the *habeas corpus* suit then pending.

(Last question repeated.)

A. Mr. Bowman has answered.
Q. Can you not answer for yourself?
A. I could in the same language that he did.
Q. Will you please do so?

Mr. BOWMAN: Answer the question if they wish the answer over again, please.
WITNESS: How is that?
Mr. BOWMAN: Please answer the question if they wish. It is very tedious, but answer the question over again if they wish it.
The WITNESS: I am no lawyer and I don't want to get myself in trouble. What is your language?
Mr. BOWMAN: Read what Mr. McGinniss said.

(The stenographer read as requested.)

WITNESS: Whatever conversations I had with Mr. Robert McDonald in the *habeas corpus* matter he was my attorney.
Q. Then you regarded any statements that you made to Mr. McDonald about this suit of Bowman against Patrick as coming
162 within the sphere of his relations to you as your counsel, did you?
A. I suppose that is the way it would be taken.
Q. Had you more than one conversation with Mr. McDonald? I speak of this suit of Bowman against Patrick.

Mr. BOWMAN: I object. The witness has not stated he ever had a conversation with Mr. McDonald as to the suit of Bowman against Patrick, and the question assumes that which hasn't been testified to. On the contrary, the witness testified his conversations with Mr. McDonald were had with him as his attorney in the *habeas corpus* then pending, and not that this case was ever pending at that time, and I object to the question as assuming what has been testified or stated and what is not the fact, that this case was pending.

WITNESS: My conversation with Mr. McDonald in the *habeas corpus* matter—he was my attorney in those transactions.
Q. Had you ever prior to the bringing of this suit of Bowman against Patrick any conversation with Mr. McDonald on that subject?

Mr. BOWMAN: I object to the question as not definite or intelligible, as it don't define what subject; whether the *habeas corpus* matter or what.

WITNESS: I object to answering the question on the same ground as given before, he being my attorney.
Q. Had you ever any conversations with Mr. Bowman, the plaintiff in this case, on the subject of the bringing of this suit prior to the time when it was brought?

A. Shall I answer the question?

Mr. McGINNISS: Yes; as for as we are concerned.

A. All the conversations that I had at the time of the *habeas corpus* bringing was while in Mr. McDonald's presence and as counsel for me.

Q. Will you answer the question whether or not prior to
163 the bringing of this suit of Bowman against Patrick you ever had any conversation with Mr. Bowman, the plaintiff, on the subject of the bringing of this suit?

A. Haven't I already answered the question?

COUNSEL: No; I think not.

The WITNESS: What conversations I had while in Mr. Robert McDonald's presence as attorney? No, sir; I had none.

Q. Did you ever make any statements or have any conversations with Mr. McDonald or any other person in the presence of Mr. Bowman about the bringing of this suit prior to the time when it was brought?

A. My conversations were with Mr. Robert S. McDonald.

Q. Were any of them in the presence of Mr. Bowman?

A. Yes; my conversations. I had a conversation with Robert McDonald in Mr. Bowman's presence.

Q. How many such conversations had you prior to the bringing of this suit? I mean conversations with Mr. McDonald in the presence of Mr. Bowman.

A. One.

Q. Only one?

A. That is my recollection.

Q. When was that?

A. It was here in this office.

Q. In the office where we are now sitting?

A. Yes.

Q. And when?

A. I don't remember that.

Q. Can you fix the date with reference to the time when the *habeas corpus* proceeding was decided?

A. I don't remember that.

Q. Well, can you state whether it was before the decision of the circuit court in the city of St. Louis in the *habeas corpus* matter or whether it was subsequent to that date?

A. I don't recollect that.

Q. Will you now state what was said at that conversation?

A. I don't remember what was said.

Q. Do you not remember in substance any of the things
164 that were said?

A. No, sir; I do not.

Q. What enables you to remember the fact of the conversation at all?

A. You asked me if Mr. Bowman was ever in Robert McDonald's presence and mine when I have seen Robert S. McDonald, and I told you he was.

Q. I ask you now what it is that enables you to remember the

fact that you did have a conversation with Mr. McDonald in Mr. Bowman's presence on the subject of the bringing of this suit, and that you are now unable to recall anything that was said at that conversation.

A. I don't just remember.

Q. Have you no recollection at all on the subject as to the substance in general of that conversation?

A. I have no recollection of that.

Q. Do you recollect anything that was said by Mr. Bowman in substance?

A. No; I don't recollect that.

Q. Do you recollect nothing that was said by yourself in substance?

A. No, sir.

Q. Do you recollect nothing that was said by Mr. McDonald on that subject in substance?

A. No, sir; I can't remember anything of the kind.

At this point I adjourned the further taking of the testimony of this witness until Saturday, February 19th, at 11 o'clock a. m.

FEBRUARY 19TH, 1887—11 a. m.

Parties met pursuant to adjournment.

Present as at the last hearing.

EDWARD CUNNINGHAM, JR., being called and sworn as a
165 witness on behalf of the plaintiff, testified as follows:

By Mr. BOWMAN:

Q. When did you last see Mr. William F. Patrick, one of the defendants in this case?

A. One day in the present week, I think; my impression is it was Monday last.

Q. Was he then informed that notice had been given and we were proceeding to take depositions in the present case; did he then possess that information?

A. I think so.

Q. You were at the time possessed of that information as his counsel, were you not?

A. I was possessed of the information that the depositions under the present notice and commission were being taken; yes.

Q. You were aware that when this case was transferred from the State court to the United States court we had then issued a subpœna and also an attachment for Mr. Patrick to appear and testify in this case, were you not?

A. I was aware that an application in the State court for the removal of this case to the Federal court was made, and that there was an effort to take the deposition of the defendant William F. Patrick under the notice and as under proceedings in the State court; yes.

Q. Do you know whether Mr. Patrick stopped at any hotel while in St. Louis?

A. I do not.
Q. Where did you meet him?
A. At my office, in St. Louis.
Q. At what time in the day was it, as near as you can recollect?
A. In the forenoon, and, without being accurate, I should say between 10 and 12 o'clock, but about the exact hour I can't say.
Q. Have you any information as to where he went when he left here or where he could be now found?
A. I have no positive information. My understanding is that he returned to Leadville, but about that I am not sure. My impression is he is at Leadville now, but of that I am not sure.
Q. Were you not informed that he was going from here to
166 Chicago?
A. I was not.
Q. Have you been informed by the plaintiff in this case of the desire of the plaintiff to obtain the testimony of William F. Patrick?
A. Only in this, that on yesterday, I think, the plaintiff stated to me in the circuit court—the State court, I mean—that he wished to take the testimony of William F. Patrick.
Q. Do you know where James M. Patrick is?
A. I do not know; to the best of my knowledge and belief, he is about Denver.
Q. When did you see him last?
A. I can't say positively; I do not recollect seeing him since about the time when this suit was removed to the Federal court. Perhaps I can give more accurate information——

Mr. BOWMAN: I don't care. That is enough. I will ask for subpœnaes for William F. Patrick and for James M. Patrick.

The cross-examination of THOMAS WARD MCMANUS was then resumed as follows:

(By Mr. CUNNINGHAM:)

Q. Have you any further information than you stated on Thursday evening when we adjourned as to the substance of the conversation you had with Mr. McDonald in Mr. Bowman's presence about this suit?
A. No, sir; I have not.
Q. Have you thought over the matter at all?
A. No, sir; I have been busy and have been away and have had lots to attend to and have not given it a thought.
Q. Did you not induce the bringing of this suit?
A. No, sir.
Q. You stated in your direct examination that you went out of town because you did not wish to testify in this case?
A. Yes, sir.
Q. Was that wish the result of any request by these defendants, William F. Patrick or James M. Patrick, that you should not
167 testify in the case, or that you should not produce any documents in your possession having reference to the case?
A. No, sir.

Q. Your personal relations with James M. Patrick are not pleasant, are they?

A. I refuse to answer that question.

Q. Are you upon terms of special intimacy or good will with William F. Patrick?

A. I have never had any words with the gentleman; I do not know why I should not be.

Q. Will you state as a matter of fact whether you are personally intimate with William F. Patrick?

A. I am acquainted with William T. Patrick.

Q. The question was not whether you were acquainted with him, but whether you are intimate with him.

A. In what way do you have reference to?

Q. Socially or in a business point of view; either.

A. I have met Mr. William T. Patrick; I have had conversations with Mr. William F. Patrick, and I have had some business transactions with Mr. William F. Patrick, but not recently.

Q. Then will you answer the question whether you are upon terms of special intimacy with William F. Patrick?

A. I do not know what you mean by special intimacy; you will have to define that, that I may know.

Q. Are you very much attached to him, so that your attachment to him would bias your testimony in his favor in this case?

A. No; I do not know that it would.

Q. You decline to state whether your terms with James M. Patrick are unpleasant?

A. I decline.

Q. Can you give any reason why you decline to answer that question?

A. I refuse to give that.

Q. You refuse to give the reasons why?

A. I refuse to mention James M. Patrick in any way in connection with what you are undertaking to bring out.

168 Mr. BOWMAN: We object. It is clearly incompetent. We object to the reasons of the unpleasantness between them. I do not wish family matters brought out in this case.

Q. I do not ask anything as to the reasons why you may or may not be on unpleasant terms with James M. Patrick. The reason why I put the question to you is, in the questions put to you by the plaintiff it was intimated that you were a brother-in-law and intimate with James M. Patrick and because of your relations and intimacy with him you were unwilling to testify in this case. Now, I will ask you whether any attachment or intimacy or special good will which you entertain towards James M. Patrick was the reason why you were unwilling to testify in this case.

Mr. BOWMAN: We object to the question as improper in form and as argumentative and as an argument rather than a question.

WITNESS: I refuse to answer it.

Mr. McGINNESS (counsel for the witness): I will advise the witness to answer the question.

Mr. BOWMAN: Not in that form. I think that question is not competent.

Mr. McGINNESS: He wants to get at the fact whether they are on friendly terms.

Mr. BOWMAN: I have no objection to that.

WITNESS: At present we are not. I will answer in that way. At present Mr. James Patrick and myself are not on friendly terms.

Mr. McGINNESS: He don't object to answering that question, but he don't want to answer anything that has relation to family matters. He wishes to keep from going into family matters, but is willing to answer all other things in reference to this suit that have no bearing upon the family matters, and I so instruct him.

Mr. CUNNINGHAM: I wish to show whether or not the witness is biased in favor of the defendant James M. Patrick. That is
169 all I want.

Redirect examination by Mr. BOWMAN:

Q. Have you had an opportunity to further examine your papers, so that you will be able to state now whether you have any further letters or memoranda in writing of any description from any person at any time as to the affairs of the Col. Sellers mine?

Mr. CUNNINGHAM: We object to the question because counsel for the plaintiff distinctly stated at the close of the examination that they were through with the examination of the witness, and that the question now put does not relate to any matter brought out in the cross-examination.

Mr. BOWMAN: I tell you, in response to that, that we said we were through for the present in examining him, but it was distinctly understood that the witness was to have until Monday next in which to search his papers for further documents relating to this matter, and I now ask if he has any that he could produce at this time.

Mr. CUNNINGHAM: The examiner will bear in mind that the defendant distinctly refused to go into the cross-examination of the witness until the plaintiffs were entirely through, and that plaintiff reiterated the assurance that he was entirely through with the witness before the defendants began their cross-examination.

(The examiner referred to the testimony taken at the former hearing, in which the witness was asked if he would examine his paper for further documents relating to the matter in controversy, and if he would produce the same by the following Monday at 3 o'clock; that the witness answered that he would endeavor
170 to do so, and in view of this fact the examiner held that the counsel could proceed with his examination.)

Q. Are you prepared to produce them at this time?

A. No, sir; I am not.

Q. You have other papers and memoranda relating to the Col. Sellers mine other than the four produced, have you not?

A. I do not know whether I have or not. I have made nu hunt since I have brought them down. I have not hunted or tried to hunt anything of the kind since then.

Q. What conversations, if any, have you at any time had with William F. Patrick as to the Col. Sellers mine and the value of the property?

A. I have never had any at all.

Q. What conversation have you had with James M. Patrick, one of the defendants here, as to the value of the Col. Sellers mine?

Objected to as not growing out of the cross-examination.

Mr. BOWMAN: It necessarily does, the examination being interrupted for the want of getting the papers.

A. Yes; I have had conversations.

Q. What did he say as to the value of the Col. Sellers mine and the amount that has been realized from operating the same?

Objected to as not growing out of the cross-examination.

Mr. BOWMAN: I desire to have it understood that the witness may be considered as recalled if this objection is insisted upon.

WITNESS: At what time?

Q. In any conversations you had with him.

A. Do you mean before the bet or after the bet?

Q. After and before, what did he say? To proceed in the order as to the date, before the paper marked 1, which has been referred to as the bet was made, what did he say as to his knowledge
171 of the value of the mine prior to that time?

A. I do not recollect that he said anything as to the value of the mine.

Q. Or as to the ore that had been taken out or the quality or the amount of it?

A. You mean before the bet?

Q. Before the bet.

Question objected to for the reason already stated and for the further reason that it is incompetent as against William F. Patrick in any event.

The WITNESS: Well, as a commencement to begin with, the commencement was he proposed to make a bet. He had been running me about mines in which I had no faith and he stated that they had a fine mine—meaning the Col. Sellers—and I told him "Yes; I supposed he had" or something to that effect. I don't know just the words exactly, but, like all others, it would develope, as a great many others had, as a sink hole and with nothing at the bottom of it; and then he proposed making a bet on the strength of what they had, and he proposed to make the kind of bet that you have seen,

marked No. 1. He told me at the time that he was taking my money because they had that there already.

Q. Has he ever claimed that the bet so made should be paid?

Same objection.

The WITNESS: Yes, sir.

Q. When did he so claim?

A. Before the maturity of the time for the payment of the bet and after it.

Q. Has he since that time, before the bringing of this suit, made any statement to you as to the value of the Col. Sellers mine or the amount and value of the ore taken out at any time up to the bringing of this suit?

Same objection.

A. Yes, sir; not as to the value of the mine; no.

Q. As to the amount of ore that has been taken out?

A. Not in that way.

172 Q. What have been his statements in reference to the Col. Sellers mine and its operation?

A. As evidence received from them.

Q. State what his statements have been to you as to that.

Same objection.

A. I don't remember that.

Q. State in substance, as near as you can, what he has represented.

A. That they had already got it out of the mine and wanted me to pay the bet before it was due.

Q. Have you at any time seen in the handwriting of William F. Patrick or James M. Patrick any statements as to the amounts realized from the operation of the mine?

Objected to for the same reasons as before stated and for the further reason, if in writing, the writing is the best evidence.

The WITNESS: I refuse to answer the question.

Mr. MCGINNESS: That is not a family matter. What we mean by family matters is merely social matters, personal to your family. Anything in the nature of business relating to this mine, you can state any conversations concerning them; and any paper or document relating to it, you can produce the paper.

Q. Not in his handwriting.

Q. Not in James M. Patrick's handwriting?

A. No, sir.

Q. Or William F. Patrick's handwriting?

A. No, sir.

Q. In any one's writing is there, then, or by their authority?

A. No, sir.

Q. By any person of the family or either having knowledge of the fact?

Objected to as immaterial and incompetent.

A. I would rather not answer that; I refuse to answer it.

Mr. McGINNESS: That is not inquiring into family matters.

173 A. Well, I refuse to answer it. I will not answer it.

Q. State fully as to all knowledge and information you have from the parties interested in the Col. Sellers mine as to the amount and value of the ore taken therefrom or the dividends paid thereon.

Objected to as before.

Q. Up to now, do you mean?

Q. Up to the present day.

A. I don't know. I don't know.

Q. I didn't ask if you knew, but to state what knowledge or information you have from the parties interested on that subject.

Objected to as heretofore, and also as calling for a conclusion of the witness as to who the parties interested are, because it calls for the contents of written instruments.

The WITNESS: Only that they have been large. I can answer in that way.

Answer objected to on the same ground.

Q. About how much in any one year?

A. I don't know. I don't know.

Q. As much as $60,000 a year upon a fourth interest?

Objected to as leading.

A. As to my knowledge?

Q. No; your information from the parties. I don't ask your personal knowledge.

A. Yes.

Q. More than that?

A. I don't know. I don't know.

Q. In what year was that, if you recollect?

A. I don't remember.

Q. Did you ever hear Mr. James M. Patrick make any statements as to the manner in which the plaintiff in this case was induced to make any conveyance of an interest in the Col. Sellers

174 mine?

A. I won't answer that question.

Mr. BOWMAN: I will stop right there and insist that the court order the witness to answer the question and will postpone the further taking of testimony until the next adjournment.

At this point the further taking of testimony in this cause was adjourned until 11 o'clock Wednesday, February 23.

FEBRUARY 23, 1886.

Parties met pursuant to adjournment, and by consent the further taking of testimony in this cause was adjourned until February 24,

at 11 a. m., then to be resumed at the office of E. McGinness, room No. 402 4th floor Roe building, southwest corner of Pine and Broadway.

FEBRUARY 24, 1887—11 a. m.

Parties met pursuant to adjournment.

Present: On behalf of the plaintiff, F. J. Bowman, Esq., and E. McGinness, Esq.; on behalf of the defendant, E. C. Eliot.

The redirect examination of THOMAS WARD MCMANUS was resumed as follows:

Mr. BOWMAN: For the present I will withdraw the last question I asked you at the last hearing and will ask you if you know——

Mr. ELIOT: I wish to enter an objection here which has been entered perhaps heretofore, but I wish it understood that the defendants in this case are objecting to any examination of this
175 witness at the present time because of a recall, which, according to the practice under the rules of the United States court, can't be done, and we desire the objection noted here to be understood as continuing through the whole examination.

Mr. BOWMAN: Plaintiff states that they have now reason to believe that further facts can be shown by this witness than they were aware of when he was first on the stand, and they desire it to be understood that they recall him for the reason that other papers have been discovered that make it necessary to further examine him on the facts in support of the plaintiff's cause.

Q. I will ask you now if you know the signature to this letter of St. Louis, October 19, 1882, addressed to Mr. Frank J. Bowman. Do you know whose signature that is?

Objected to as incompetent and irrelevant.

A. Yes, sir.

Mr. BOWMAN: I now offer it in evidence.

Mr. ELIOT: I object to the introduction of the paper in evidence.

(Paper referred to is marked Exhibit 1 and attached to this deposition. It was read as follows:)

"Frank J. Bowman, attorney-at-law, northwest corner of 8th and Pine streets.

ST. LOUIS, *October 19th*, 1882.

Mr. Frank J. Bowman:

DEAR SIR: Please to convey the entire one-fourth interest held by you, in your name, (two-thirds for yourself, and one-third for me) in the Col. Sellers and Accident mines, near Leadville Colorado to my brother Wm. F. Patrick, with whom I will arrange as to my interest.

Respectfully,

JAMES M. PATRICK."

176 Mr. BOWMAN: For the purpose of asking the witness some questions we will now offer in evidence a letter previously identified by the witness as in the handwriting of Mrs. William F. Patrick, dated Knoxville, August 21, 1882.

Mr. ELIOT: I object to the introduction of this letter, and if the plaintiff insists upon the introduction of this letter I will ask that the examination be here stopped, and that the examiner certify the question and objection and offer of evidence to the judge of the United States court for determination. The reason that this request is made at this time is that counsel regard the letter as incompetent and irrelevant, and that if offered in evidence it will necessitate an extended examination, which it is not desirable to enter into at this time.

(The examiner declined to certify as requested).

The paper referred to was then offered in evidence and marked Exhibit No. 2, and was read as follows:

"KNOXVILLE, *August* 21, 1882.

DEAR JEMMIE: I have just received a letter from Will, in which he tells me I was mistaken about his securing B's. interest in the Col. Sellars. He only had the written promise of it. The deed has not been delivered to him. In my letter to-day he tells me to caution all of our home folk not to mention the success of the prospect, and adds "If you have said anything to home folk about the Col. S. caution them not to mention it whatever they do, for if it should get to St. L. and to B's ears, it might cause me considerable trouble and expense to get him out of the contract. Please caution the family not to mention it until I get a deed from B."

I am sorry I have said anything about it, but as I have for pity's sake, do not tell it, or if like myself you have said anything
177 to Fannie or Mr. McM—do write immediately and ask then to keep it secret, so much depends upon a rigid silence. As Will said, if Mr. Bowman hears it, he can cause him a great deal of trouble to say nothing of the expense. I feel dreadfully and I shall never again put myself in this position. I am going to the "Quarry" early to-morrow to caution mother and father. Do help me to keep this business as quiet as possible. You see at a glance how much depends upon it. My sister is not so well to-day, although she is better than when I first came. With love, and an earnest request that you will burn this as soon as received, I am, hastily and truly,

ANNIE."

Defendants' counsel objected to the foregoing as incompetent and irrelevant.

Q. I wish you would state, if you know, Mr. McManus, who Jemmie is as here referred to, whether either of the defendants in this case were shown and designated by that name in the family?

Defendants' counsel objected to the question as practically including two questions and as ambiguous.

Q. I will withdraw the question. Do you know whether either of the defendants was known and designated by the name of "Jemmie;" and, if so, which?

A. Jemmie is James M. Patrick.

Q. Do you know whether either of the defendants is designated in the family by the name of Will.; and, if so, which?

Objected to as incompetent.

A. Will. is William F. Patrick.

Q. In whose handwriting is this letter, dated Bradley Quarry, August 28, 1882, addressed "My Dear Fannie," whose signature is this that is thereto attached?

Objected to as being improperly framed and leading and
178 ambiguous.

A. This is James M. Patrick, a brother-in-law of mine.

Q. One of the defendants in this suit?

A. Yes, sir.

(Paper referred to offered in evidence and marked Exhibit 3.)

Mr. ELIOT: I object to the question as incompetent and irrelevand, first, on the ground that this appears to be a communication from a husband to his wife; secondly, because it can in no manner affect *ot* be evidence as against the defendant William F. Patrick in this case, and I ask that the examiner certify this question at once to the circuit court for determination.

(The examiner declined to certify as requested.)

The letter was then read as follows:

"BRADLEY QUARRY, *Aug.* 28, 1882.

MY DEAR FANNIE, I write this on the anniversary of your birthday with the hope that *that* I may not be long after in reaching you.

Yesterday was the wettest, gloomiest, and dullest day that I ever spent here or elsewhere. It commenced raining Saturday night, rained all night, and all day yesterday with the exception of about an hour of sunshine in the morning. Towards evening it got so cool that I was obliged to put on my heavy winter coat, and shut up the house. But to-day has been a model (as it should be) day in every respect. Cool, bright, and sunshiny with a warm interval now and then. We are now pretty well sold out of house and home. Sam has now $48 cash in hand with stoves, carpets, chairs yet to sell. The stove is sold for $17 man promises to bring the money for it on Thursday.

I telegraphed you yesterday on to-day's anniversary. I have been trying to get a horse to drive to town for the last week. All the
stock is now being used by the farmers for plowing. I will
179 get one to-morrow from one of the men and Sam and I go to town and come to-morrow evening. Sam has finished packing both of the trunks, and they are now ready for our journey home. The boxes also are partly ready, and can be ready in an

hour's notice. I have not had a letter from you since one I received last Saturday. I seems from all reports that we are to have a rainy time here for some days to come. Uncle Billy and Eva went over in buggy last Thursday to Rhea Springs on the Cin. Southern about forty-five (45) miles north of here. As you may imagine he did not go for pleasure, but had business with the owner of the property who is a brother of Mrs. Cowan. By the way Sam was holding the tin toilet set and one or two other things for her and could have sold them. Yesterday he sent over to tell her that she could have them, when she sent word back that she did not want them. To say that Sam was mad, would hardly give a correct idea of how he felt.

Mrs. Trubeville has offered Sam $5 for both the carpets, but he is holding out for a better offer.

I have an old suit of worn out fall clothing which I have told Sam to sell for $6 if he can get that much.

Old yeast powder boxes are now selling well in this market, as high as three cents a piece or five for fifteen cents. Mrs. Moulock would like to get Gypsy for her little girl, but I think I will leave it with Harve, will be better treated I think.

Willie has written to Annie (and she to me) telling her that there was an interest in the Col. Sellers which he wished to buy before the news of the strike got out, and wanted her and I to keep the matter quiet for a few weeks until he could get the deed.

I expect to leave here next Saturday or Sunday. We will stop half a day at Chattanooga and go home by way of Nashville,
180 instead of Cin. I may stop over a few hours at Nashville between trains. I can finish all my business at home in a few days.

My Dear. Here I am now at the hotel for the night. Sam came in with me but has gone back by himself. I have sent (this p. m.) the buckboard harness and whip to Knoxville to be sold. Could not be sold for cash down here. I sent this evening a deed to Keeley, he is to make a new copy of it and send it to you. You are to sign it before a notary and have the notary attach a certificate from the county or circuit clerk that he (the notary) is only qualified. Then send it to me at 2741 as soon as possible. The reason for all this is that there was an informality in the title you held from ma. In writing the deed last winter I named myself as trustee for mother, when I should have put father's name instead. It is all right as I have a new deed from ma and pa now in my pocket which they signed at Knoxville on the 13th.

(Yours lovingly) your husband

JAS. M. PATRICK."

Mr. Bowman: I will now offer this letter dated Bradley, August 20, 1882, signed James M. Patrick.

(Paper referred to is offered in evidence and marked Exhibit No. 4.)

Mr. Eliot: I object as incompetent and irrelevant and as not

being binding upon the defendant William F. Patrick in this cause, and, further, it is incompetent as being a privileged communication from a husband to his wife.

(The letter was then read as follows:)

BRADLEY, *Aug. 20th*, 1882.

MY DEAR WIFE: I have passed a quiet and tranquil day, and now after nine p. m. I write in remembrance of the day. The
181 morning was cool but by nine o'clock it has become sunshiny and bright. Just a short time after breakfast Steve Rice and his brother came to the quarry and Sam did not let them go until he had sold them about three dollars ($3) worth of goods and got the money.

Sam has now about $17.50 on hand; he has sold a good many articles which are to be delivered and paid for when we are through with them. At the rate he is selling them we will realize very near cost price on most of the articles. Yesterday he sold those candy forks which you remember came with the boxes of candy to Mrs. Cowan for thirty cents. He told her they were pickle forks and dilated on them to such an extent as to cause quite a little rivalry between her and Mrs. Trubeville about them. I hope to get everything finished up here this — and get away some time next week.

I am glad mother is feeling so well and hope she will soon feel the good effects of the water. Ma and pa have both written me since Friday and both are anxious to hear from you and mother. Ma tells me to remind you that you still owe her a letter.

Willie has written saying that he has struck a fine vein of silver ore, and is very much pleased with it.

The weather here now is perfect, a light gentle rain, most every evening or night, and bright warm (not too warm) days.

The last news from Mrs. Hale (per ma's letter) is that she is no worse, with a slight improvement if anything.

I am glad you are able by one or another pretext to keep out of Mrs. Powell's way. She is a woman calculated to make every one with whom she comes in contact uncomfortable and discontented. At least I always felt that when in her presence.

Sam has put $9 on the carpets and says he thinks he can get it.

182 The yeast powder cans he has sold to some woman near here for 15 cts, 3 cts. apiece. Told her he used them to can preserves and tomatoes. You remember the oblong fish cans sold for 10 cts. each; called them pudding pans. Think we will be about sold out by end of this week. Running short now on things to work with. With much love and many pleasant memories of the day,

Your husband, JAS. M. PATRICK.

Q. I will ask you again if you know in whose handwriting Exhibit 4 is and whose signature is attached thereto.

Objected to as before.

A. That is a brother-in-law of mine, James M. Patrick.

Q. One of the defendants in this case?

A. Yes, sir.

Q. I will ask you now to look again at the paper that was marked No. 1, which bears date St. Louis, October 27, 1882, and state in whose handwriting that is and whose signatures are attached thereto.

A. That is a brother-in-law of mine, James M. Patrick, and my signature, Thomas Ward McManus.

Q. I will ask you whether at any time prior to October 27, 1882, you had a conversation with the defendant James M. Patrick with reference to the obtaining of the interest of the plaintiff in this case then held by him in the Col. Sellers mine.

Objected to on the ground that it assumes facts not shown.

Q. I will ask you whether about October 22, 1882, or at any time in October prior thereto you had a conversation with the defendant James M. Patrick—whether you had a conversation with him in the month of October.

A. About what do you mean?

Q. Concerning the Col. Sellers mine.

A. Yes, sir.

Q. What did he say in that conversation, if anything, as to the interest held by the plaintiff?

183 Counsel for the defendant objected to the question as incompetent and irrelevant and as in no manner proper to bind either of the defendants herein.

Q. What did he say in that conversation?

A. He had been speaking about what a good mine he had, and I had been telling him the contrary, and then he spoke of getting Bowman's interest—that he was going to get it—and I told him if it was as good a thing as he said that Bowman was too smart to let his interest go, and he said, "Oh, never mind; I will get that; I can get around Bowman." That is about all it was.

Q. What, if anything, did he say as to Bowman's knowledge of the value of the mine?

Objected to; incompetent, irrelevant, and hearsay.

A. I don't know that he said anything.

Q. How long was this prior to the time—about how long was this prior to the time—when this paper that I hold in my hand, dated October 27, was signed; about how long before, if you can recollect?

Objected to, as the witness has not stated when the paper was signed or that it was ever in possession of himself or of the defendant James M. Patrick at any given date.

A. Week or 10 days—something like that; it might have been longer.

Q. What, if anything, did he say in that conversation as to seeing the plaintiff Bowman?

Objected to as leading and, further, as incompetent and irrelevant to bind either party to this suit.

The WITNESS: Must I answer the question? He said he was going down to arrange matters for getting at his (Bowman's) interest.

Q. What did he say, if anything, with reference to the value
184 of the mine at that time of this conversation?

Objected to as leading.

The WITNESS: Must I answer that question?

Mr. ELIOT: It is not for me to say. Do you speak to me, Mr. McManus?

The WITNESS: Not putting any figures on it, but he said that it was very rich and that they had a very good thing, a good thing.

Q. That was the conversation you have referred to in which he first proposed to make the bet afterwards reduced to writing on the 27th?

Objected to as leading.

A. Yes, sir.

Q. In this bet, as it has been designated, of October 27, 1882, which you say was spoken of some says prior thereto, the Col. Sellers or Accident shafts are referred to; did you know from the defendants or of your own personal knowledge as to the relation of those shafts to the Col. Sellers mine—of your own knowledge or from statements of the defendants?

Objected to as assuming facts not shown and as leading.

A. Not of my own knowledge.

Q. Do you — from statements made by them?

A. Yes, sir.

Q. State what they are.

Objected to as incompetent and irrelevant.

A. There is a paper there showing with a drawing on it.

Q. Is this the drawing you refer to?

Objected to as before.

A. Yes, sir.

Q. I will ask you if you know in whose handwriting the words are written on the corner of this paper.

A. That is in mine, this is his.

185 Q. Was this same matter subsequently incorporated into the document that has been introduced in evidence of October 27, and called the bet?

Objected to as incompetent and assuming facts not shown.

A. The one written by James M. Patrick was taken from what I had put down there myself, with the exception of these amounts in here, inside of the plat. The plat is his drawing.

Q. It is not yours?
A. No, sir.
Q. You don't know whose it is; it is not yours?
A. No, sir; it is James M. Patrick's drawing.

(Answer objected to.)

Q. I will ask from whom you received this piece of paper.
A. James M. Patrick.
Q. Will you state whether the paper I have exhibited to you with the writing thereon and the drawing is in ink or lead pencil?
A. It is in pencil.

Mr. BOWMAN: I will now offer in evidence the paper dated St. Louis, October 27, 1882, signed by James Patrick and Thomas Ward McManus, as testified to by the witness.

(Paper referred to is offered in evidence and marked Exhibit 5, and was read as follows:)

(Duplicate.)

ST. LOUIS, *Oct. 27th*, 1882.

James M. Patrick bets Thos. Ward McManus one silk dress pattern, to cost not less than seventy-five ($75) dollars, that his brother, Wm. F. Patrick, of Colorado, will have sold enough ore from the Col. Sellers or Accident shafts (either or both) now being sunk to have realized him eight thousand ($8,000) dollars or more in money from the sales of ore. The sales to have taken place and the money paid to him before the twenty-seventh day of Oct., 1883. This bet off or a draw should the courts enjoin and keep mines from being worked.

186 JAMES PATRICK. [SEAL.]
THOS. WARD McMANUS.

Mr. ELIOT: I object to the introduction of the paper in evidence as incompetent and irrelevant and in no manner calculated to bind either of the parties to the suit, and I enter a further objection, particularly in respect to the defendant William F. Patrick, on the ground that the paper cannot be evidence against him in this case and as irrelevant against him in this case.

Q. Was the memoranda on the corner of this plat made in the presence of Mr. Patrick?
A. Yes, sir.
Q. Was that embodied in written form—what we had been proposing some days prior thereto to you?
A. Yes, sir.

Objected to as leading, incompetent, and irrelevant.

Mr. BOWMAN: I now offer the paper in evidence.

(Paper referred to was offered in evidence, marked Exhibit 6.)

Mr. ELIOT: I object to the introduction of this paper as incompetent and irrelevant, and, further, as not having been shown to have

been in any manner within the knowledge of either of the defendants in this case and as incompetent to bind either of the defendants for any purpose.

(Paper was then read as follows:)

"J. M. Patrick and T. W. McManus, this October 27, 1882, have made bet of a silk dress to cost $75 with William Patrick will have taken out of the Col. Sellers mine and Accident mine in Colorado $8,000, and the amount is share, & the same to be taken out by the 27th of October 1882."

Over which is written the figure "3."

Q. I will ask you whether you have stated the conversation as you think it occurred about a week or 10 days, or possibly
187 more, prior to October 27, in which Mr. James M. Patrick, the defendant, said that he was going to get Bowman's interest—whether in that conversation he represented he had obtained Bowman's interest or was going to try to obtain it. State fully whatever was said in that connection.

A. No; he said that he was going to get it and I told him no. I says, "Bowman is too smart a man and you can't get his interest if it is worth, as you say, what it is." "Well," he says, "I have got a way of doing those things."

Objected to as heretofore and particularly as irrelevant on behalf of William F. Patrick.

Q. You state that this conversation was a week or 10 days prior to October 27. What is your best recollection as to the time when it occurred?

A. Well, it was fully that length of time. It might have been longer. I won't say.

Q. Do you say it was in the month of October or otherwise?

A. Yes; it was in October.

Q. It was in October, 1882, I understood you, and I only ask for the purpose of seeing if I understood you correctly that the defendant James M. Patrick or William F. Patrick—I do not recall which—had represented to you that the income from this mine had been as much as $60,000 per annum on a fourth interest. Will you restate what you said in that connection?

A. No; I didn't say that thing. I didn't say that.

Mr. ELIOT: We enter an objection to this as incompetent and irrelevant.

Q. What did you say in reference to any representations that either of the defendants had made with reference to the amount that had been taken out of the mine in any one year?

Objected to as involving conversations, the time and place not being stated.

188 A. Well, that they had paid largely and getting good dividends. That is from James M. Patrick, not from William. Don't get them mixed.

Q. To how large an extent, if you can recall?

A. I don't know that he at any time told me. I don't know that he at any time told me just how much he got.

Q. What is your best recollection about the representations he made or the statements he made?

Objected to as too indefinite in its nature.

A. Well, I have nothing from him—that is, as to any one amount; not from him.

Q. Have you any knowledge or information derived from parties in interest as to the amount, knowledge, or information derived from parties in interest other than the plaintiff as to the amount realized in working the mine?

Objected to as incompetent and involved and as not specific as to time and place.

A. Yes, sir.

Q. State it.

A. I would rather not.

Q. I mean the amount of it.

A. I don't know the amount.

Q. Was that information in writing or verbal?

A. It is both.

Q. You need not state such as in writing, but please to state what is verbal.

Same objection.

A. I don't know as I am compelled to answer them questions.

At this point a recess was taken until 2 p. m.

At the expiration of the recess the witness was cross-examined by E. C. ELIOT as follows:

189 Q. How long have you known the defendant James M. Patrick?

A. I will have to study; about 16 or 17 years.

Q. You are not related to him otherwise than by marriage?

A. That is all.

Q. He married your sister?

A. Yes, sir.

Q. Was Mr. Patrick residing in the city of St. Louis at the time of the conversation you have referred to in your direct examination in the month of October, 1882?

A. I am not positive. I think not; no, I think not.

Q. Where was he residing at that time, if you know?

A. In Tennessee, if I recollect correctly.

Q. Where did this conversation take place, in St. Louis or Tennessee?

A. In St. Louis, 2741 Lucas avenue.

Q. He was here at that time?

A. Yes, sir.

Q. How long had he been here previously to that time in the city of St. Louis?

A. That is, from Tennessee?

Q. From anywhere?

A. I can't say; I can't say positively.

Q. As near as you can recollect?

A. I would have to refresh my mind on that.

Q. Did he come here at that time from Tennessee?

A. Yes, sir.

Q. Had he at that time or any time previously to your knowledge been in Colorado?

A. Yes, sir.

Q. How long before?

A. Well, I say yes; now I want to draw a line there. He told me he had; he started for there; whether he did or not I can't say.

Q. You have no personal knowledge on that point?

A. Only just from him.

Q. Was this in a conversation between you and him that he told you he was going or had been to Colorado?

A. Yes.

Q. When did that take place?

A. At the house.

190 Q. When?

A. During his stay at our house.

Q. At what time was that?

A. And before my sister's marriage he had spoken of it while visiting there, and also after her marriage; I can't locate the time.

Q. Was that some months before this conversation took place?

A. Him being in Colorado?

Q. Yes.

A. Some months previously?

Q. Yes—he hadn't been to Colorado recently as far as you know, say in the months of August or September prior to the conversation you refer to as in October?

A. I believe he had.

Q. When, if you know?

A. I can't say noe.

Q. You say this conversation referred to in your direct examination took place at your house, 2741 Lucas avenue?

A. About what?

Q. Which you referred to in your direct examination.

A. About what?

Q. With respect to the bet of the Col. Sellers mine.

A. Yes.

Q. Had there been any previous conversations between you and him which led up to this specific one to which you refer?

A. Oh, yes, sir.

Q. Was he living at the house at that time?

A. He was at our house at that time.

Q. There were numerous conversations between you?

A. Yes, sir; several.

Q. Was it not or was it a matter of difference of opinion between you and him as to whether the Col. Sellers mine would develope into a valuable property or not at that time?

A. I held that it was like other shafts or holes, whatever you may term it, that had been sunk; that I had no faith in them. He thought differently, and out of that grew this bet, and he said that they had it there already, and that it was like taking money.

191 Q. It was on this difference of opinion between you that this bet was made?

A. Oh, that is always the case.

Q. I just want it down.

A. That is right.

Q. In this conversation or in the course of any previous conversations that you had had with Mr. Patrick, was there anything that he said to you from which you could derive a certainty as to the value of this property?

A. No; I can't say that there was any more than he said this when speaking of the bet and wishing to make it; he actually drove me to it by his conversation; that is the plain talk. He said that William was an expert and he knew what he was doing, and he was relying on William's judgment in the making of these bets about that matter, and later he spoke of having heard of William as to what they had there.

Q. When was that; you say "later"—after or before the bet was made?

A. That was before the bet was made.

Q. Was there anything in his statement to you which led you to believe that at that time the mine had developed into a very valuable property at that time?

A. His conversation was that; of course, if I had thought as he did I would not have made the bet, but I thought differently.

Q. Have you had experience in mines?

A. No, sir.

Q. Have you had any observation of the results of experimentally and partially developing mining properties?

A. No, sir.

Q. Then why do you say that you inferred or supposed this mine was like other mines which were naturally holes or properties of every little value?

A. Only this; I have known many people that have invested their money to regret it afterwards. I came near going into a mine and was glad afterwards I had not. That is the one with which the —— were connected.

Q. Don't you know it to be a fact that investments in mining property are very uncertain?

192 A. Well, that is what I think, but he didn't think so.

Q. Were you, then, a man of some capital?

A. Yes; I have some money.

Q. Do you devote your time largely to the making of what you regard proper or profitable investments?

Objected to as incompetent and irrelevant.

A. Yes, sir.

Q. Then you, as an experienced investor, regard mining properties or prospects as of uncertain or improbably value?

Objected to the same as before.

A. I might say that in one sense.

Q. In a general sense?

A. And not in another; taking my own say so, I would say I know nothing about it; but if I had the judgment of another man that I relied on and had made my investment I would back his opinion up and not mine.

Q. Personally have you mining investments?

A. Yes, sir.

Q. Do you regard them as safe?

Objected to as incompetent.

A. Yes, sir; I do.

Q. Is it not generally a fact that this business——

A. Those that I have I do understand.

Q. Is it not generally a fact that persons holding or owning mining properties regard those particular mines as being different from the general run of such properties, and as save in your experience?

Objected to as before.

A. Well, as I have said, I do not profess to go into these mines and only know them in one way, and that was that it was like a gambling scheme.

Answer objected to.

193 Q. The amount of the matter is that in your opinion as an investor mines are precarious or doubtful subjects of investment?

Objected to as before.

A. That is, with me it would be if I was connected with a mine. I would look on it—I would look into them and see and endeavor to make a proper examination and then I could back my own opinion up. That would be different, but as I am I would say yes, it was.

Q. At the time this bet was made between you and James M. Patrick was there any test agreed between you as to the method in which the bet or by which the bet should be decided?

A. Yes.

Q. What was that?

A. That there was—let us see if I can remember it—I can't remember it in words exactly how.

Q. State as near as you can.

A. I gave Mr. Patrick some writings as to what I wanted him to sign.

Q. What Mr. Patrick?

A. James Patrick for his brother.

Q. For who to sign?

A. That is, for William Patrick to sign.

Q. Then was it or not a fact that you referred the matter in some shape or form to William F. Patrick to determine?

A. It was through his decision—William's decision—that the bet was to be decided. I wrote an article and gave it to James Patrick to send to his brother.

Q. In what shape was that?

A. It was in writing.

Q. In the form of a simple statement or one to be made under oath?

A. It was one to be made under oath.

Q. When was that you gave that to James M. Patrick?

A. That was after his return from Cleveland; about the time or just before the time; I have forgotten which. It was at the time, anyhow, that he claimed the bet, and he wouldn't send that one, but he took and made a copy wherein he recited this bet and omitted something that I had put in; just what it was I don't
194 remember, but it was not what I had written, and they had it sworn to by William or purported to be.

Q. Did you see it?

A. Yes; I seen it or James handed me.

Q. When was that?

A. That was at the time or just before the time the bet was due, or at least that he claimed it was due.

Q. Was that one year later?

A. I do not think it was a year; my recollection was it was before the bet was due. I won't be positive. I won't say that.

Q. When was the bet due?

A. In 1883.

Q. One year after it was executed?

A. Yes; that is the way the article read.

Q. Was that bet ever settled in any form?

A. No more than this, that I told him I was willing to pay the bet, but that I wanted my paper signed.

Q. You wanted the paper you wrote signed?

A. Yes, sir.

Q. Was there anything peculiar about that paper which was urged to you by James M. Patrick as a reason why that paper should not be signed?

A. I don't remember that there was, but it was not the one that I had written; it was one made by him.

Q. You declined to pay the bet on that ground—that the paper was not signed?

A. Yes, sir.

Q. Do you know whether at or about the time that the bet dated October 27, 1882, was made by you and Mr. James M. Patrick whether Mr. James M. Patrick wrote to his brother or communicated with his brother, William F. Patrick, for information on the question of the bet?

A. I know this, that James M. Patrick told me that he had heard

from his brother in relation to it, and that it was already won without waiting a year.

(By Mr. McGINNESS:)

Q. What time was that that he told you he had heard?
A. After the bet was made.
Q. How soon after?
A. I can't remember; shortly after.
195 Q. About how soon?
A. I don't remember; I don't recollect that.

(By Mr. ELIOT): Have you in your possession any letter purporting to be addressed to James M. Patrick from William F. Patrick relating to the subject of this bet or to matters the determination of which involved this bet from William F. Patrick?

A. I refuse to answer that question.

Mr. McGINNESS: You can answer the question; it is a proper question.

A. Yes, sir: I have.
Q. Will you produce it?

Mr. McGINNESS: We object. It will be produced when notice is given.
WITNESS: No, sir; I will not produce it.
Mr. McGINNESS: We will produce it when notice is given.

Q. Have you any knowledge personally of the Col. Sellers mine?
A. No, sir; I have not.
Q. Have you ever been there?
A. No, sir.
Q. Is your opinion on the value of mines of any value in your belief?
A. I am not expert in mining and I can't pass an opinion.
Q. Did you have any conversations with Mr. James M. Patrick later in date than the bet referred to in which it appeared or in which he made statements to you showing that the value of development of the Col. Sellers mine was still uncertain?
A. No, sir; it was all the other way; that it was certain and that he had won the bet claiming it.
Q. I refer now to any time immediately after this bet was made.
A. Yes: he claimed all along the line that it was won.
Q. Did he state to you or do you know of your own knowledge or from the statements made to you by the defendant Wil-
196 liam M. Patrick that the title to this mine was at that time in litigation; at that time or subsequent?
A. No; he never did.
Q. Mr. McManus, is it true or is it not true that about the month of October, 1886, your relations with Mr. James M. Patrick were personally unpleasant, and there were difficulties between you which took the form then of litigation?
A. I can't say between me; no.

Q. I will, then, put it as a question between Mr. James M. Patrick and yourself or members of your family.

A. I can't say that either—October you say?

Q. In or about the month of October, 1886?

A. The first or the only, you might say, suits of any kind—the *habeas corpus* suit was the only one between James M. Patrick and myself.

Q. Will you state whether on the 15th of October, 1886, there were *habeas corpus* proceedings pending between you and Mr. Patrick with reference to the custody of his child?

A. There was a *habeas corpus* proceeding, but I don't remember the dates of that.

Q. Can you by thinking fix it as of the 14th or 15th of October?

A. The court records will show; I would not like to say now.

—. To the best of your impression was it at or about that date?

A. I can't say that; the court records will show.

Q. Are you interested directly or indirectly in any manner in the event of this present suit?

A. I am not; no, sir.

Q. Was it at the time when litigation was pending between you and Mr. Patrick an object or motive to you of any kind whatsoever that this suit should be brought?

A. I do not know that it was.

Q. What is your best impression?

A. No, sir.

Q. It was not?

A. Yes, sir.

197 Q. An object of any kind?

A. No, sir.

Q. State whether or not you directly or indirectly, by yourself, your agents or attorneys, in writing or verbally or in any manner whatsoever, gave information of the letters which have been produced here or other documents to Mr. Frank J. Bowman, plaintiff in this case, or to any one for him or to be used by him in any manner whatsoever for the institution of this suit.

A. No, sir.

Q. Was it or was it not an object with you to coerce the defendant J. M. Patrick in other matters pending between you and him by having this suit in some form or shape pressed against him?

A. If I had I would have done all I could for him in information if I had had any or might have got.

Q. Mr. McManus, to whom did the letters or do the letters which you produce here upon your examination addressed to James M. Patrick and which you testified as being in your custody found with your sister's papers belong?

Objected to as a conclusion of law and as irrelevant and incompetent.

A. I claim them as my property now.

Q. To whom did the letter which has been produced here in evi-

dence and has been received from your custody, addressed to Fannie and signed James M. Patrick, belong?

Same objection.

A. Well, it came into my possession. Until it finds its proper source I claim the right to it.

Q. To whom does it belong and what is its proper source?

A. Well, that is the question.

Q. Answer as near as you can.

A. The will describes that and also gifts made by my sister previous to her death.

Q. Are you executor of your sister?

A. I am.

198 Q. Have your letters been suspended?

A. Yes, sir.

Q. Are they now suspended?

A. I can't say, sir.

Q. Is Mr. E. C. Tittman, public administer, now in charge of the estate or your sister's estate?

Objected to, as the public records will show.

A. The records show that.

Q. Now, how is it, Mr. McManus, that letters addressed to Mr. James M. Patrick and which therefore upon their face purport to belong to Mr. James M. Patrick and letters addressed to Fannie, meaning your sister, of whom you are the executor, but your letters are suspended, are not in the hands of those persons who properly own them?

Objected to as incompetent and irrelevant, and it matters not who are the owners of the letters; it is merely a question of what force they are as evidence in this case.

A. I refuse to answer, as it probably might cut a figure in other cases.

Q. Are you familiar with the handwriting of Mr. James M. Patrick?

A. Yes, sir.

Q. Have you seen a great deal of it?

A. Yes, sir.

Q. Are you familiar with the handwriting of Mrs. William F. Patrick?

A. I have seen some of it.

Q. Did you ever see her write?

A. I believe I have.

Q. Could you, from what you have seen her write, undertake to say what her handwriting is?

A. I believe I would.

Q. How often have you seen the handwriting of Mrs. William F. Patrick to know it of your own knowledge, and not from information of other persons, that it is her handwriting?

A. I can't say that.

Q. Is it not a fact that in attempting to pass upon the handwriting of Mrs. William F. Patrick you are determined largely
199 by the signature itself rather than the character of the handwriting itself?

A. No, sir.

Q. Would you undertake in any paper so presented to you without the signature to it to determine whether it was or wasn't the handwriting of Mrs. William F. Patrick?

A. Would I undertake to?

Q. Or could you properly undertake from your knowledge of her handwriting?

A. I prefer not to answer that question.

Mr. McGinness: You can answer if you wish to.

A. I think I could.

Alexander Young, sworn and examined on behalf of the plaintiff, testified as follows:

(By Mr. Bowman:)

Q. Do you know William F. Patrick?

A. Yes, sir.

Q. When did you last see him?

Objected to as incompetent and irrelevant.

A. I saw him on the morning of the 14th of this month.

Q. Where?

Objected to as incompetent and irrelevant.

A. On the incoming Missouri Pacific train from Kansas City; I came on the same sleeper with him from Kansas City, and the last I saw of him it was just as we were getting into the city of St. Louis, at the union depot; the porter was brushing him up preparatory to leaving the car.

Defendants' counsel objects to the answer, not because it was a matter of importance, but because the whereabouts of the de-
200 fendant in this case at that time was of no relevancy to the issue in this cause.

Mr. Bowman: We submit on behalf of the plaintiff, inasmuch as it is known to the defendant that when they transferred this case Mr. Patrick was under attachment to appear and testify and inasmuch as they know that we have asked for subpœnaes in this examination, and that later, as testified, the defendant was informed at the date now spoken of by the witness that depositions were being taken, that it is relevant for us to show that he was in St. Louis, avoiding process.

Mr. Eliot: I object to the remark of counsel in the reference made to any avoiding of process of the party here, as nothing has been shown in this case in any form or shape that the defendant

has avoided or attempted to avoid any process of this court or examiner.

Cross-examination declined.

At this point the further taking of testimony in this case was adjourned, subject to convenience of counsel.

MARCH 9, 1887.

Parties met by agreement at 9 a. m., at the office of E. McGinnis, Roe building, 510 Pine street, at 9 a. m., and the further taking of testimony in this cause was resumed.

Present: On behalf of the plaintiff, E. McGinnis and R. S. McDonald; on behalf of the defendant, E. C. Eliot.

WILLIAM PATRICK, sworn and examined, testified as follows:

(By Mr. MCGINNIS:)

Q. State your name and residence.

A. My name is Wm. Patrick. I reside in Colorado. That
201 is where my family lives now, at Denver.

Q. Where were you in the spring of 1882?

A. Early in the spring I was here; in the summer I was in Tennessee.

Q. At what point in Tennessee?

A. In the neighborhood of Knoxville.

Q. What time in the summer were you there, what months?

A. I think I was there probably from about the 1st of June to the 1st of September or October, without leaving.

Q. Was William F. Patrick, your son, there during that time?

A. Yes, sir; I think he was.

Q. During what part of that time, from June to September, 1882, was your son, William F. Patrick, with you in Tennessee?

A. I can't say; during the summer some time; he and his wife came there and I saw them there in 1882.

Q. About what time, according to the best of your recollection?

A. Well, now, Mr. McGinnis, that would be a hard matter for me to say; it was between June and October.

Q. How long did he stay?

A. I don't know; I think he came up to see me once, but I don't remember of ever seeing him after that.

Q. How far were you apart?

A. Five miles and a half and the river between us.

Q. How many times did you go to see him or meet him anywhere?

A. I don't think I met him at any place, only when he came to see me; he and his wife drove up in a buggy to see me; I didn't get to Knoxville very often, and I don't think he stayed more than a few days.

Q. During that time?

A. I think so, in that visit—I think he stayed a few days.

Q. Did he make more than one visit between the first of June and the first of October, 1882?

A. Not that I recollect.

202 Q. Your impression is he stayed a few days?

A. My impression is he stayed a few days.

Q. According to your recollection, in what month was it he made that visit?

A. I do not know. It was some time between, but I have no recollection about the time; not a bit. He just merely came up and saw us, I know, where we were living, and we were living in that house four months, and during the time that we lived there—June, July, August, and September—in that house—no, I am mistaken; we did not go into that house until about the 20th of June, I think, and then we lived there four months; that would put us into October.

Q. Did he come to see you soon after he went there or just before you came away?

A. I don't know, sir.

Q. Was it near the middle of the time or near the beginning or the end of your stay there?

A. I can't say; there is nothing to impress it on my memory as to time.

Q. Was Mrs. Annie Patrick there prior to his visit there?

A. I do not know.

Q. Did she come with him from Colorado?

A. I don't know; I don't recollect. I know they were at my house together and took dinner, but whether she came previous or with him I can't say.

Q. Had she a father and mother living at that time?

A. No; her father wasn't alive.

Q. Was her mother living there at that time?

A. Yes, sir.

Q. Her father wasn't?

A. Her father died before she was married.

Q. Where and what is the "quarry" in Tennessee?

A. It is a marble quarry in the forks in Knox county; what is called the forks, between the Holstein and the French Broad. It lays right in the forks five miles east of Knoxville.

Q. Did you live at that time at the quarry?

203 A. I lived about three quarters of a mile above it, up the river further.

Q. Was there anybody living at the quarry—her father or mother?

Mr. ELIOT: I do not see the relevancy of this question. I wish to enter an objection to this course of examination.

Q. Was her father or mother living at the quarry or near it?

A. Oh, no; they were living at Knoxville.

Q. Living where?

A. Her mother was living at Knoxville and her father was dead.

Q. How about you and your wife living at the quarry?

A. We were three-quarters of a mile from the quarry.

Q. Did you see your son, James Patrick, in Tennessee during the six months you were there in 1882?

A. Not that year.

Q. He was not there that year?

A. I have no recollection of his being there that year; not the slightest.

Q. When you saw your son, William F. Patrick, what mention, if any, did he make to you of the Col. Sellers mine?

A. Nothing that I recollect of, sir; nothing at all that I recollect of now.

Q. Didn't mention the subject at all?

A. No, sir. He is a very reticent man, and he didn't mention it at all to me, now that I have any kind of recollection of —. That is the first time I saw him there. He just came for his dinner and stayed an hour or so and went away.

Q. When was the next time you saw him after that time?

A. The next year.

Q. Where and when?

A. At the same place.

Q. Did he say anything to you about the Col. Sellers mine then?

A. Yes; we talked about it then.

Q. What did he say then?

A. Well, he said he thought it was a pretty good mine.

Q. What time of the year was it?

204 A. We lived two years in that house—that is, two summers—and we rented the house about the same time each year and vacated it about the same time.

Q. You were there in the summer of 1883?

A. Yes, sir; it must have been some time between the 20th of June and the 15th or 20th of October.

Q. Did you see his wife, Annie Patrick, in the summer of 1882?

A. I saw her at my house.

Q. Did she say anything to you in regard to the Col. Sellers mine?

Objected to as incompetent and irrelevant.

A. Not that I have any recollection of, sir.

Q. Don't you know that on August 22, 1882, she told you and your wife to keep quiet and not let it get out to anybody that mineral had been discovered in the Col. Sellers shaft?

Objected to as incompetent and irrelevant for any purpose whatsoever in this case.

A. Well, I will answer it; I have no such recollection whatever.

Q. Has your son, William Patrick, told you how much in dividends had been paid by the Col. Sellers and Accident mines from the time of the discovery of mineral to date?

A. Never, sir; never told me a word about how much and I have no idea how much.

Q. Did your son James tell you?

A. No, sir, never; never told me how much.

Q. Have they ever given an idea to you approximately?

Objected to so far as it refers to anything after October, 1882.

A. No, sir; never have told me.

Q. Have they ever given to you the amount of any one dividend, either of them?

A. No, sir; never have; never seen their checks and I have never seen the amount of their dividends or any one dividend.

205 Q. Don't you know from other sources that they have received very large dividends?

Objected to as incompetent and irrelevant.

A. I have heard that they were paying good big dividends.

Q. How much?

A. I don't know.

Q. About how much?

A. I don't know that even.

Q. Did not you hear from any one in August, 1882, that mineral had been discovered in the Col. Sellers shaft?

Objected to as incompetent and irrelevant and indefinite in its form.

A. I never heard anything of it.

Q. When did you first hear that there was mineral discovered in the Col. Sellers shaft?

A. I heard it on the second visit of my son—the visit of my son in 1883.

Q. You never heard it from any one prior to that time?

A. Never, sir; I never heard of it. I knew they were working it, but I never knew as to the amount of mineral.

Q. I will now read to you from a letter offered in evidence written by Annie to James F. Patrick, dated August 21, 1882.

A. Where from, sir?

Q. From Knoxville, Tennessee.

A. To where?

Q. To James M. Patrick, of this city, I understand, in which she makes the following statement: "In my letter to-day he tells me to caution all of the home folks and says, 'if you have said anything to our home folk- about the Col. S., caution them not to mention it, whatever they do. If it should get to B.'s ears'——

The WITNESS: Whose ears?

Q. B.'s ears; B. is Bowman—'it would cause him considerable trouble and expense to get him out of the contract. Please caution the family not to mention it until I get a deed from B.' I am sorry

206 I have said anything about it, but, as I have, for pity's sake do not tell it; or, if like myself you have said anything (to Fannie or Mr. McM.), do write immediately and ask them to keep it secret. So much depends upon a rigid silence. As Will. said, if Mr. Bowman hears it he can cause him a great deal of trouble, to say nothing of the expense. I feel dreadfully and I shall never again

put myself in this position. I am going to the 'quarry' early to-morrow to caution mother and father."

A. Never heard of it, sir.

Q. Never?

A. No. The first I heard of the letter I heard it was in print, but I never heard of it otherwise.

Q. She and her husband came to your house?

A. When?

Q. In August, 1882.

A. I can't say what month, but it was between June 20, and her husband was with her at that time.

Q. I will ask you to look at this letter and tell me in whose handwriting it is, if you know.

Objected to as irrelevant and incompetent.

A. I believe that is my wife's handwriting, sir. It looks like it, at least.

Q. Where is Asbury?

A. Asbury is the post office at the quarry; a couple of miles from the quarry where we lived.

Q. Now, I will read from this letter to you.

Mr. ELIOT: Do you offer it now?

Mr. MCGINNIS: I am going to read one question first. I read you the following from the letter dated Asbury, August 22, 1882, "My dear son;" in that letter she says as follows: "Annie drove out to see us this morning, the first visit she has made us. She is very sanguine over the Col. S., but Will. has written her to keep everything quiet, as Bowman has not yet given up his deed, and if he finds the property very valuable it may be difficult to make him." Now, I will ask you if your wife kept secret from you the information stated in her letter of August 22nd.

Objected to as incompetent and irrelevant and as involv-
207 ing communications of husband and wife, and, further, because the question contains written matter not offered or received in evidence.

A. I never heard of the letter.

Q. Did you hear of the information contained in it?

A. I never heard of the information. I stated before I never heard of the information. As regards the secret between myself and my wife, probably you might go into our household secrets. I don't know.

Q. This business relates to a matter where one party defrauded another, and we are getting at the secrets of that.

A. If you say I shall answer the secrets between myself and wife I will do so.

Q. There is my question. Where is your son William F. Patrick now, to the best of your knowledge?

Objected to as incompetent and irrelevant and as having nothing to do with the questions involved in this case at the present time.

A. To the best of my belief he is in Leadville, sir.
Q. Is that his residence?
A. That is his residence; yes, sir.
Q. Where is your son James F. Patrick now, to your knowledge?
A. I don't know, sir.
Q. Where is his residence?
A. Denver.
Q. When did you see either of them last?
A. I saw William Patrick about three weeks ago last Saturday, I think, or four; I can't say which.
Q. When did you last see Jim?
A. I saw James last Sunday.
Q. Isn't your son Jim somewhere East now?

Objected to as incompetent.

A. I don't know.
Q. Don't you know he has left Denver?
208 A. Yes, I do; I saw him in Chicago.
Q. When?
A. Last Sunday.
Q. With whom else did you see him?

Objected to as before.

A. I saw him with his brother Edward.

Mr. McGINNIS: I now offer in evidence the letter shown to the witness and identified by him, dated August 22, 1882, in connection with his testimony.

Paper referred to is marked Exhibit No. 7 and attached to the deposition.

Mr. ELIOT: I object to the letter and to the offer in evidence on the ground that it is incompetent and irrelevant. It does not appear to whom the same was addressed nor by whom the same is written, and, further and particularly, as incompetent to bind the defendant William F. Patrick in this case for any purpose whatsoever.

Cross-examination by Mr. ELLIOT:

Q. Did you, in the summer of 1885 or thereabouts, have any conversation with the plaintiff in this case, Mr. Frank J. Bowman?
A. Yes, sir.
Q. State when and where that conversation took place.
A. Well, what street is this; Pine?
Q. Yes, sir.
A. At the corner of Pine and Sixth.
Q. What time was that?
A. On the northeast corner.

(By Mr. McGINNIS:)

Q. What year?
209 A. 1885; two years ago this coming summer.

Q. What time in the summer?

A. I can't tell you. It was warm weather.

Q. About?

A. Well, along, say, in June or July. It was warm weather. I was living in the country and I was just in here on business.

Q. State what occurred or what was said by you or him in that conversation.

A. He met me at the corner. He was coming this way and I was going that way. He was coming east and I was going west, and he stopped me on the curbstone and shook hands with me and he said: "Well, your boys are making some money out of that mine;" and I said, "Yes; I believe they are." "Well," he said, "I ought to have held onto that mine, but I couldn't do it. I hadn't the wherewith to do so." I am not giving you the exact language, gentlemen.

Q. State as nearly as you can the substance of that conversation.

A. And he says, "I am very glad they are making some," and we talked a little and parted, and that was about the substance of it, and the impression made on my mind was that he hadn't the money to carry it out or he would have held on.

Q. That was all that occurred?

A. That was all. It was in the sun and we didn't stand there more than a minute or a minute and a half talking.

Q. Have you ever had any other conversation with the plaintiff, Frank J. Bowman, with respect to the Col. Sellers mine?

A. A week before that. We met several times before that and he would make about something about those same remarks—once or twice before that he made this time, if I recollect. I don't now recollect just where we met. It was lately; only last summer a year ago, but I won't say what month, for I don't know. I know it was a very hot day when we met.

210 Redirect examination by Mr. McGINNIS:

Q. Did you in that conversation with Mr. Bowman, in the summer of 1885, tell him of the information mentioned in the letter of Annie of August 21st, 1882, and in the letter of your wife of August 22nd, 1882?

Mr. ELIOT: I object to the question as incompetent, irrelevant, and involving reference to matters not proven in evidence.

A. I couldn't have done so, for I knew nothing of them.

At this point a recess was taken until 2.30 p. m.

Before signing the foregoing deposition I wish to say that in answer to the question, "I will ask you to look at this letter and tell me in whose handwriting it is, if you know," I answered, "I believe it is my wife's handwriting, sir; it looks like it at least, but I am not positive."

W. PATRICK.

MARCH 16, 1887.

Parties met by agreement at 2 o'clock p. m. at the office of E. McGinnis, Esq., Roe building.

Present: E. McGinnis, Esq., for the plaintiff; Edward Cunningham, Jr., for the defendant.

JULIUS H. GERHARD, being sworn and examined, testified as follows:

(By Mr. McGINNIS:)

Q. State your residence and occupation.

A. My residence is 4521 Duncan Ave., St. Louis. I keep a barber shop under the Planters' house, 109 north 4th street.

Q. Is Albert J. Gerhard your son?

A. Yes; my second son.

Q. What is his age, about?

A. I think 32 years.

211 —. Where does he reside?

A. With me.

Q. In St. Louis?

A. Yes, sir.

Q. Is he away from your place often—that is, out of the State?

A. Yes—that is, he is interested in mining; he is out in Colorado and New Mexico, interested in both States.

Q. Did you or your son Albert J. ever buy an interest in the Col. Sellers and Accident mines, near Leadville, Colorado?

A. I did not; my son did.

Q. When did your son buy that interest?

A. It must be—I can't tell you that; about five or six years ago, I think.

Q. From whom did he buy?

Mr. CUNNINGHAM: Of your own knowledge; not what other people told you.

A. I think he told me he bought——

Mr. CUNNINGHAM: I object.

The WITNESS: I have no knowledge of my own, except what my son told me.

Q. From whom did he tell you he bought?

Objected to as hearsay.

A. My son?

Q. Yes.

A. think he bought an interest from a man named Stebbins; he holds still a large interest in the mine now. That is what he told me.

Q. What did he give for it?

Mr. CUNNINGHAM: If you know.

A. I think he told me he gave—I can't say only what he told me;

I don't know nothing about his business except what he told me himself, and that is all I know.

Q. He told you what?

Same objection as before.

A. I think he told me he paid something like $1,700 for it.

Answer objected to.

212 Q. Where did your son get that $1,700? Didn't he get it from you?

A. No; he was in the hardware business at the time in Leadville. The firm was Gerhard & Nead.

Q. When was the last dividend paid by the Col. Sellers mine, as far as you know or have been informed?

A. I think that was last July or August; I forget which.

Objected to unless the witness can state of his own knowledge.

A. I don't know, of my own knowledge.

Q. What time do you think it was?

A. I think it was July or August.

Q. What was the amount?

A. I think $1,700, if I am not mistaken—what he paid at first.

Q. You think it was in July or August that he bought?

A. No, no; when the dividend was paid.

Q. What time of the year did your son buy an interest in the Col. Sellers mine—what months?

A. I think that must have been early in the spring—in March or April, I think—something like that. He wrote me at the time that he had bought that interest in it.

Q. Didn't you send money to your son at any time in 1882?

Objected to as immaterial and leading.

A. No, sir.

Q. When was the last dividend paid by the Col. Sellers mine?

Objected to unless the witness can state of his own knowledge.

A. All my knowledge is hearsay, what I heard from my son.

Q. When was it?

A. I think it was either in July or August last. It might have been in June, because he left here on the 14th of March to
213 go to Leadville—not to Leadville, but to Kingston, New Mexico—and his correspondence didn't come to our house. It went straight on to Kingston, New Mexico, and, I think, in one of his letters——

Mr. CUNNINGHAM: I object to any statement in any letter.

Q. What was the amount of the last dividend?

Objected to unless the witness can state of his own knowledge.

A. Well, I have no knowledge of my own at all. I can't tell what it was. It was a small dividend I know to what he had had

some. I don't believe it was more than about $300 or something of the kind.

Q. You mean the whole dividend on his part?

A. The last dividend what he got.

Q. How many dividends in all has the mine paid?

Objected to unless the witness can state of his own knowledge.

A. Well, I can't tell. He told me——

Mr. CUNNINGHAM: I object to any statement by the witness of what his son said or wrote to him as incompetent.

Q. I will ask you if you did not and have not received a part of the dividends from the Col. Sellers mine.

A. No; never; never.

Q. Were any of the checks or drafts for the dividends in the mines delivered to you by your son?

A. Never; never.

Q. Did you ever handle one of them?

A. Never—that is, he might have shown me a check now and then what he received, but that is the only handling I had of it, just merely to show me he got a dividend.

Q. Do you know William F. Patrick?

A. Yes, sir.

Q. When did you see him last?

A. Last fall some time.

214 Q. Do you know James Patrick?

A. Yes, sir.

Q. When did you see him last?

A. In the winter some time I saw him.

Q. During this winter?

A. Yes; well, it might have been November.

Q. Did he say anything to you about this suit of Bowman against himself and his brother?

A. No.

Q. Do you know Patrick, Sr., the father?

A. Yes.

Q. When did you see him last?

A. I saw him the other day; this last week, I think.

Q. Did you have a conversation with him about this suit?

A. None at all; just simply said "How do you do?" He told me he had just come from Denver, and that is all.

Cross-examination by Mr. CUNNINGHAM:

Q. Mr. Gerhard, you don't know of your own knowledge as a fact that your son bought any interest in this mine, do you, further than what he told you?

A. That is all.

Q. You don't know except from the fact that he told you so that he ever received any dividends, do you?

A. Well, he showed me some checks which he had received and told me they were dividends.

Q. But do you know of your own knowledge those checks were dividends from the Col. Sellers mine?

A. No; except what he told me.

(By Mr. McGINNIS:)

Q. Do you know how much in all, altogether, the Col. Sellers mine has paid in dividends?

A. I do not.

Q. Did your son never tell you that?

A. No.

(Witness claims $2.00 for two days' attendance.)

215 A. J. GERHARD, being sworn and examined, testified as follows:

By Mr. McGINNIS:

Q. State your name, age, and residence and occupation.

A. My name is A. J. Gerhard; I am 31 years of age; am in the mining business, and reside in St. Louis.

Q. Do you know William F. and James Patrick?

A. Yes, sir.

Q. How long have you known William F. Patrick?

A. For four years and a half.

Q. Then you became acquainted with him when and where?

A. When I became connected with the Col. Sellers mine in Leadville, July or August, 1882.

Q. When did you see William F. Patrick last?

A. April, 1885.

Q. When did you see James Patrick last?

A. December, 1886.

Q. When did you see the father, Patrick, Sr., last?

A. I saw him only a few days ago—a week or 10 days ago.

Q. Have you any interest in the Col. Sellers mine and the Accident mine?

A. Yes.

Q. What interest?

A. A $\frac{3}{64}$ths in the Col. Sellers and $\frac{2}{64}$ths in the Accident.

Q. Was your interest in those two mines ever greater or less than it is now?

A. They were less than now.

Q. When did you first get an interest in the Col. Sellers mine and the Accident and what was that interest?

A. In July, 1882, J. C. Whiting and J. C. Nead and myself purchased of T. C. Stebbins a $\frac{1}{16}$th interest in the Col. Sellers and Accident claims. The interests were divided—J. C. Whiting, $\frac{1}{3\frac{1}{2}}$nd; Nead, $\frac{1}{64}$th, and myself, $\frac{1}{64}$th.

Q. When did you get your remaining interests in those mines?

A. I bought in connection with Mr. Whiting a $\frac{1}{3\frac{1}{2}}$nd interest in the Col. Sellers.

Q. From whom?

216 A. From Harvey Howard, of Ohio, in the latter part of August or the first of September; I don't remember exactly when; either early in September or late in August of 1882, for $1,500. The interest was equally divided between Mr. Whiting and myself. I then purchased $\frac{1}{64}$th of the Col. Sellers and a 64th of the Accident from J. C. Nead in February, 1883, for $600 or about $600. I paid Mr. Nead his original purchase price plus the assessments, something less than $600.

Q. What induced you to make your first purchase in the Col. Sellers mine?

Objected to as irrelevant and immaterial.

A. I thought that by purchasing that interest I could either sell the interest at a profit or by holding it and making a paying mine of the Col. Sellers I would get more than my original investment back in the way of dividends.

Q. At the time you purchased it did you believe there was mineral there?

Objected to as immaterial and irrelevant.

A. I can't say that I believed there was. I hoped there was. There was no mineral in sight when I purchased my first interest.

Q. When did you purchase your first interest?

A. In July, 1882.

Q. What time in July?

A. The latter part of July.

Q. Did Mr. William F. Patrick say anything to you to induce that purchase?

A. No, sir; I did not meet Mr. William F. Patrick until after I had made the first purchase.

Q. How long after?

A. I met him in August some time.

Q. What time in August?

A. Say about the middle of August.

Q. At that time how far down was the shaft on the Col. Sellers mine?

A. In the neighborhood of 180 feet.

Q. Before you purchased did you go down into the shaft?

A. No, sir.

217 Q. Then on whose statement or representation did you buy into that mine, if you did not make a personal examination?

A. On Mr. Whiting's statement and on my knowledge of the location of the property.

Q. What was Mr. Whiting's statement to you?

A. I do not remember his exact words, but he thought it was a good investment and he said he was willing to put money into it, and advised me to.

Answer objected to as immaterial, incompetent, and irrelevant—this statement of Mr. Whiting's.

Q. When did you first hear and from whom that mineral had been found in the shaft of the Col. Sellers mine?

A. I believe from Mr. Whiting.

Q. When?

A. I think the last day of July.

Q. 1882?

A. July, 1882.

Q. What did he say—in what form did the information come?

Objected to as irrelevant and incompetent.

A. It was an iron pyrites carrying very little, if any, silver.

Q. Did you have any conversation with William F. Patrick about that time in regard to the matter?

A. No, sir.

Q. Was he there at that time?

A. No, sir.

Q. In Leadville?

A. He was in Leadville.

Q. Were you not in Leadville at that time?

A. I was in Leadville at that time.

Q. Did you meet Mr. Patrick?

A. Not at that time.

Q. When did you first hear from William F. Patrick that there was any mineral in that shaft?

A. I do not know that I ever heard from Mr. Patrick that there was any mineral in that shaft. I never had any conversation with Mr. Patrick in regard to the mine until long afterwards.

Q. Who was sinking that shaft on the Col. Sellers mine
218 at that time when mineral was found?

A. I understood Mr. Patrick was sinking it.

Objected to unless the witness can state of his own knowledge.

WITNESS: I merely say I understood that Mr. Patrick was sinking a shaft for mineral.

Objected to.

Q. How and from whom did Mr. Whiting get information that mineral had been found there in July, 1882?

A. I don't know.

Q. Were you ever in that shaft of the Col. Sellers mine?

A. Yes, sir.

Q. When were you there for the first time?

A. In September, 1882.

Q. What time in September, 1882?

A. I don't remember.

Q. Your ownership now in the Col. Sellers mine and Accident is what?

A. $\frac{3}{6}\frac{}{4}$ths in the Col. Sellers and $\frac{2}{6}\frac{}{4}$ths in the Accident.

Q. Is the Accident being worked?

A. I think not.

Q. Has it ever been worked since you purchased into it?

A. Yes, sir.
Q. Thorough a shaft of its own?
A. Through a shaft of its own.
Q. When was the shaft on the Accident sunk?
A. I can't say positively, but it was after we made the discovery on the Sellers.
Q. In what year did they commence sinking the shaft on the Accident?
A. I can't say about that, but I think in the end of 1882 or the early part of 1883.
Q. Are the dividends paid separately from the Col. Sellers and Accident or are they paid together?
A. They have been paid together.
219 Q. Your ownership in the Col. Sellers has been continuous from the time you first bought in down to the present day, has it?
A. Yes, sir.
Q. How many dividends in all have been paid from the time you bought in to the present time?
A. I don't remember the exact number.
Q. What is your best recollection?
A. About 30.
Q. Will you swear that no more than 30 have been paid?
A. No, sir.
Q. Have not as many as 40 been paid?
A. I think not.
Q. Haven't as many as 37 been paid?
A. I think not.
Q. Have 35?
A. I think not.
Q. Do you think any has been paid over 30?
A. I think not.
Q. When was the last dividend paid?
A. The last dividend was paid August 2nd, 1886. It was mailed to me on the second of August from Leadville.
Q. What was the amount of that dividend?
A. $8,000, if I remember rightly.
Q. That is the total dividend?
A. Yes, sir.
Q. What is the highest dividend that has ever been paid?
A. $36,000.
Q. When was that paid?
A. I believe in February or March, 1884.
Q. When was the first dividend paid?
A. In July or August, 1883.
Q. What was the amount of that?
A. I think $10,000.
Q. What has been the total amount of the dividends paid?
A. I do not remember.
Q. What is your best recollection?

A. To the best of my recollection, the total dividends are between 420 and $450,000; not over that, I think.

220 Q. Why have not dividends been paid since August, 1886, if you know?

A. Because the ore is lower in grade and expenses are very high.

Q. How and in what way did you receive your dividends?

A. Usually in New York exchange.

Q. Who sent you that?

A. Sometimes Mr. Patrick and sometimes Mr. Whiting, and sometimes the clerks in the office.

Q. Have any shaft-houses been built on the Col. Sellers and the Accident property?

A. Yes, sir.

Q. How many?

A. Three on the Col. Sellers and one on the Accident.

Q. What was the cost of them?

A. I do not know.

Q. About what?

A. Well, that is very hard to tell. I could only give a guess.

Q. Give your best impression.

Objected to unless the witness knows.

A. What do you mean by "shaft-house;" do you mean just the building?

Q. Just the building.

A. No machinery?

Q. No; we will take that afterwards; just the shaft-house alone?

A. It might be 15 to $20,000.

Q. What machinery, if any, has been purchased and is now in use or for use on that mining property?

A. Pumping machinery and hoisting machinery, ore compressors and concentration machinery.

Q. What, according to your best information, was the total cost of that machinery which you have just mentioned?

Objected to unless it is shown the witness knows something about it of his own knowledge.

A. I do not know the cost of it.

Q. What is your best information?

221 Objected to the same as the last.

A. I have no information on that subject; I can give a guess at it.

Q. Give us your best impression.

Defendants' counsel objected to any guess on the part of the witness.

A. $75,000 to $100,000.

Answer objected to for the reason stated in the objection to the question.

Q. Were not these shaft-houses and that machinery paid for out of the income from the mines before the dividends were declared—that is, had not the dividends been declared out of the money—out of the surplus?

A. Oh, they have been paid out of the mine in addition to the dividends; yes.

Q. They were paid for out of the proceeds of the mine?

A. Yes, sir.

Q. And the dividends were over and above that?

A. Over and above the machinery, etc., and the cost of the shaft-house.

Q. Has the machinery been fully paid for, as far as you know?

Objected to unless the witness knows something about it.

A. I believe so.

Q. How long have you been engaged in the mining business?

A. More or less for the last 10 years.

Q. At what point?

A. In the San Guan, in Colorado, and in Leadville, Colorado, and in Kingston, New Mexico, and Hillsborough, New Mexico.

Q. Then do you not have a general knowledge of the cost and value of mining machinery and shaft-houses?

A. Yes; a general knowledge.

Q. That is what I mean; a general knowledge. Are you informed also as to the character of a mine and its ore from
222 an inspection made by yourself?

A. Yes, sir.

Q. How long have you had that kind of knowledge to be able to determine the value of a mine from an inspection made by yourself?

A. I began to acquire that knowledge 10 years ago when I engaged in the mining business and have been adding to my knowledge ever since.

Q. And you were down in the Col. Sellers shaft in 1882, in August, you think?

A. No; I didn't say so.

Q. What month was it?

A. I went to the shaft-house in September, 1882. I did not go down in the shaft.

Q. When did you go down in the shaft of the Col. Sellers mine for the first time?

A. November; October or November, 1884.

Q. When did you last hear from William F. Patrick in any way whatsoever by messenger, letter, or telegraph?

A. Last April; April, 1886, was the last I heard of him.

Q. When did you last receive information from the mine as to how it was getting along and from whom?

A. During February last from Mr. Whiting.

Q. That is, February of this year?

A. Yes, sir.

Q. To whom for the last year has that ore that has been taken from the Col. Sellers and Accident mines been sold?

A. It was sold to the Arkansas Valley smelter, at Leadville; the St. Louis Refining & Smelting Company, at Leadville, and the Manville smelter, at Leadville; the Colorado Smelting Company, Pueblo; the Omaha & Grant, Denver, and the Argentine smelter, Kansas City. I think that is all.

Q. You say you first heard from Mr. Whiting in the latter part of July, 1882, that mineral had been discovered in the Sellers shaft. From whom did you next hear anything about the mineral being in that shaft?

A. I really don't know. I think it was Mr. Whiting. Mr. Whiting was my informant nearly always.

223 Q. Do you know how Mr. Whiting got his information?

A. He got it direct from the mine.

Q. From personal inspection?

A. From personal inspection.

Q. William F. Patrick at that time was sinking the shaft?

A. He was.

Q. When did you first hear from William F. Patrick that there was mineral in that shaft of the Col. Sellers mine?

A. I do not think Mr. Patrick ever spoke of mineral in the Col. Sellers mine to me until long, long after that—two or three years after that; two years at least—and I had no conversation with Mr. Patrick in connection with the Col. Sellers mine until 1884.

Cross-examination by Mr. CUNNINGHAM:

Q. What, from your own personal knowledge, Mr. Gerhard, do you know about Mr. William F. Patrick being engaged in sinking that shaft in July, August, or September, 1882, of your own knowledge?

A. I know nothing at all.

Q. All you know about it is——

A. From information I received from other parties—from Mr. Whiting.

Q. What had Mr. Whiting to do with the mine?

A. At that time Mr. Whiting had nothing to do with it, but Mr. Stebbins was very anxious to dispose of an interest and he went to Mr. Whiting, knowing Mr. Whiting had some money to invest in mines.

Q. And it was through Mr. Whiting that you were brought into relation with Mr. Stebbins?

A. Exactly.

Q. And made that purchase?

A. Yes, sir.

Q. Now, I understand your first purchase was made in July, 1882?

A. Exactly.

Q. The last day of July, did you say, or earlier?

A. I do not know, but it seems to me the middle of July.

224 I do not remember exactly when it was made.

Q. Was it at that time that you bought the $\frac{1}{32}$nd part from Harvey Howard?

A. No, sir.

Q. It was at that time, then, in July, 1882, that you, with two other persons, bought $\frac{2}{16}$ths or $\frac{4}{64}$ths?

A. $\frac{1}{16}$th or $\frac{4}{64}$ths.

Q. Now, what did you then pay—all of you together pay—for that $\frac{1}{16}$th or $\frac{4}{64}$ths?

A. $2,000.

Q. And what proportion of it did you get?

A. $\frac{1}{64}$th or one-quarter of the 16th.

Q. And then afterwards you bought $\frac{2}{64}$ths from Howard?

A. $\frac{2}{64}$ths of the Col. Sellers—not the Accident.

Q. In what mine was the $\frac{1}{16}$th or $\frac{4}{64}$ths?

A. The Col. Sellers and Accident combined.

Q. Afterwards, then, you bought the $\frac{1}{32}$nd in the Accident alone?

A. No; in the Col. Sellers alone.

Q. And for that you paid $1,500?

A. Yes.

Q. And that you bought late in August, was it?

A. Late in August or early in September, 1882.

Q. And for that you paid $1,500?

A. $1,500.

Q. Then you bought in the Col. Sellers mine $\frac{1}{64}$th and a $\frac{1}{64}$th in the Accident in February, 1883?

A. Exactly.

Q. And for the two you paid about $600?

A. About $600, yes; a little less; perhaps $10 to $15 less.

Q. And from whom did you make that purchase in February, 1883?

A. J. C. Nead.

Q. Was he one of the persons who had been interested with you in the joint purchase before that?

A. Yes.

Q. Where did he live?

A. He lived in Leadville; he was a partner of mine; we were in the hardware business together in Leadville.

Q. Had he been holding that stock from the summer of 1882
225 up to that time, February, 1883?

A. Yes.

Q. There had been no dividends up to that time?

A. No dividends except Irish dividends.

Q. What do you mean by "Irish dividends"?

A. Assessments.

Q. Do you remember to what extent assessments had been made upon you all or upon yourself individually?

A. I can tell about; about $90 for every 64th.

Q. That was the aggregate assessment between the time you bought and the time when you purchased from Nead?

A. Yes; though the expenses were heavier than this. We were in debt when I purchased from Mr. Nead.

Q. You mean the mine was in debt?

A. Yes; the mine was in debt several thousands. I assumed that indebtedness when I bought Mr. Nead's interest.

Q. Let me ask you to get as accurately as you can at the very date at which you first made this purchase and see if it is not later than the time you have indicated.

A. You mean the purchase from Mr. Nead?

Q. No; the purchase from Mr. Stebbins.

A. Mr. Stebbins made Mr. Whiting, Nead, and myself four different deeds. We made him payments of $500 each four different times, and whenever we made a payment he deeded us $\frac{1}{64}$th of the property. That was the arrangement we had with Mr. Stebbins.

Q. Now, what I wish to get at is the date.

A. I can't give you nearer than I gave it before.

Q. Are you sure it was prior to August, 1882?

A. Yes, sir; the first payment and the first deed we received from Mr. Stebbins was prior to August, 1882; in July, 1882.

Q. How do you fix that fact in your memory?

A. Because on the first day of August, after I had purchased and paid for a portion of the interest from Mr. Stebbins, I went
226 with some friends on a camping expedition 40 or 50 miles from Leadville and remained 10 days. I started on that expedition either the first or 2nd of August, 1882.

Q. Have you about you or accessible either of those deeds you speak of Mr. Stebbins making?

A. No, sir; they were made to Mr. Whiting and in Mr. Whiting's name, and he afterwards transferred his interest to Mr. Nead and myself or rather to me. Mr. Nead never had a deed for an interest in the mine; his interest was always in my name.

Q. Are those deeds recorded?

A. Yes, sir.

Q. Where?

A. In Leadville.

Q. In the recorder's office of that county?

A. Yes, sir.

Q. What is the county?

A. Lake county.

Q. When were they recorded?

A. They were recorded since they were executed. I think in July and August.

Q. Do you recollect whether they bore date on the day they were actually executed or whether they are antedated?

A. I think—I can't say about that. I don't recollect, but I don't think that they were antedated.

Q. Was there any written contract between Stebbins, Whiting, Nead, and yourself prior to those deeds?

A. There was a written contract between Stebbins and Whiting—a written contract between Mr. Whiting and myself.

Q. When was that made?

A. It was made in July, 1882.

Q. And the exact date in July you can't fix nearer than you have done?

A. No, sir.

Q. Have you got that contract?

A. I have not.

Q. What became of it?

A. I think it was lost or destroyed.

Q. How?

A. I don't know. I presume I lost it with other papers. I am careless about my papers.

Q. Do you mean after you got the deed?

227 A. After I got the deed from Whiting I placed no value on the agreement in writing with Mr. Whiting, and I think at that time I destroyed or lost it.

Q. Was your contract put on record?

A. No, sir.

Q. Was the contract from Stebbins to Whiting put on record?

A. I think not.

Q. Now, in September, 1882, you for the first time went to the shaft-house?

A. Yes, sir.

Q. What inspection, if any, did you make of the Col. Sellers mine at that time?

A. I examined the surface of the Col. Sellers mine; I examined the corner stakes and boundaries of the Col. Sellers and Accident; I did not go down in the shaft, because there was nothing to be seen in the shaft, there being several feet of water in the bottom of it.

Q. How long had the water been in the shaft?

A. Not more than two or three weeks, I think.

Q. Well, then, when, so far as you know, was the first time water got into the shaft—rose in the shaft?

A. The latter part of August, I believe.

Q. You say that there was no mineral in sight when you first purchased?

A. No, sir; there was not.

Q. How was it that you purchased without going into the mine?

A. I purchased on Mr. Whiting's recommendation.

Q. And what do you say Mr. Whiting had to do with the mine, if anything?

A. At that time he had nothing to do with it.

Q. He was merely agent for Stebbins for selling that, was he not?

A. No; Stebbins, knowing Whiting to be a man of means, offered a portion of his interest to Mr. Whiting, $\frac{1}{16}$th, for $2,000. Mr. Whiting didn't care to take it all and he wanted to know if I would take one-half of it. I told him I would take one-half of the 16th for Mr. Nead and myself.

228 Q. Do you know why it was Mr. Whiting did not want it all?

A. I presume the reason why Mr. Whiting did not want it all was because he did not care to take the chances of a larger interest at that time.

Q. Was he a man of means?

A. Yes; he had some money.

Q. What was Mr. Whiting's business?

A. At that time he was in no other business. He had been in the manufacture of stamped tinware and enamel ware in St. Louis, but he had sold out shortly before that time—5 or 6 months before that time—and he went to Leadville to engage in the mining business.

Q. Now, you say you learned from Whiting that they had struck some iron pyrites?

A. Yes, sir.

Q. What was the date of that information? When did you learn that fact?

A. I think it was the very last day of July.

Q. Was it after you had entered into your contract with Whiting?

A. Yes, sir.

Q. What do you know as a matter of fact about their striking iron pyrites there?

A. All that I know about it is what I learned from Mr. Whiting. I can say this, though, about the iron pyrites, that that was not the main ore bed. It was a little stringer, and in Leadville iron pyrites are frequently struck long before the ore is struck, and sometimes iron pyrites are struck and no ore is struck worth speaking of.

Q. So, from your knowledge as an expert, iron pyrites by no means gives a certain indication that there is paying mineral in there?

A. I should say that by no means is it a certain indication.

Q. What do you mean by a stringer?

A. A stringer is a little seam in the rock filled with ore.

Q. Do you know of your own knowledge what was done in the way of sinking that shaft between the last day of July and
229 the time when the water came in there?

A. I had my information from Mr. Whiting.

Q. Was Mr. Whiting actually engaged in working the mine himself during that time?

A. No, sir; he was not working the mine himself during that time, but there was scarcely a day passed but Mr. Whiting went up to examine the mine. I was in business at that time in Leadville and I got my information and relied upon it altogether from Mr. Whiting.

Q. What did Mr. Whiting do with the remaining part of the interests that he had acquired from Stebbins?

A. The remaining part?

Q. He didn't sell it all to you, did he, or your associates?

A. I can't say that Mr. Whiting sold any interest to me at all; we bought together. I bought no interest direct from Mr. Whiting, though he made me a deed for the interest I bought from Stebbins.

Q. What did Mr. Whiting do with the interest he got?

A. He still retains it.

Q. Where is it?

A. In Leadville.

Q. What is his business?
A. He is manager of the Col. Sellers mine at this time.
Q. When did he become manager?
A. On the first day of September.
Q. What year?
A. 1886.
Q. Last September?
A. Yes, sir.
Q. Of your own knowledge, can you state who was manager prior to the time that he became manager?
A. Yes, sir.
Q. Who was it?
A. Mr. William F. Patrick.
Q. Continuously?
A. Continuously.
Q. From July, 1882, to September, 1886?
A. Yes, sir.

230 Q. You don't know anything of your own personal knowledge on what day or in what month paying mineral was first struck in that mine, do you?

A. Not of my own knowledge.
Q. Did you state from whom you, in February, 1883, bought the $\frac{1}{64}$th interest in the Col. Sellers and the $\frac{1}{64}$th in the Accident?
A. Yes, sir; from J. C. Nead.
Q. Do you know how it was that Nead sold to you or was willing to sell to you in 1883 for less than he had paid in the summer of 1882?
A. He didn't sell it to me for less. He sold it to me exactly what the interest cost him.
Q. The same figures exactly?
A. The same figure exactly; it cost him $500 originally plus $90 or $100, in that neighborhood, for assessments, and I purchased it at that price.

(By Mr. McGINNIS:)

Q. What was his interest at that time?
A. $\frac{1}{64}$th in the Col. Sellers and $\frac{1}{64}$th in the Accident.

(By Mr. CUNNINGHAM:)

Q. Do you know what the indebtedness of the mine was at the time you bought out Nead's interest?
A. No; I do not know what it was, but from 2 to 4 or $5,000.
Q. Do you know what part of the improvements you have spoken of had been put up there at that time?
A. There were no improvements at that time.
Q. No improvements when you bought Nead out?
A. No, sir.
Q. Do you know of sales of stock or interests in the mines that were made about the time you bought Nead out or just prior to that time?

A. Mr. Whiting sold a 64th of the Sellers and a 64th of the Accident about that time, either shortly before or shortly after.

Q. And do you know at what prices?

A. At about the same prices that I purchased from Mr. Nead.

Q. For what reason, if you know, was it that the value of those interests did not increase in the estimation of the people who were dealing in the stock at that time or dealing in that sort of
231 interests in the mines?

A. Because we had very little ore in sight. We had struck some ore there which had paid, but we did not go down into it deep, more than a few inches or two feet at the outside, before water came into the shaft, and we tried to handle that water first with a small pump, and then with a larger, and then with still a larger, and we did not succeed in handling the water with any of those pumps. It was on that account Mr. Nead sold, and also because Mr. Nead wanted the money for other purposes; he wanted to engage in the hardware business in Kansas City about that time. He lives in Kansas City now.

Q. What, if anything, do you know about the transfers of interests in the Col. Sellers mine and the Accident mines or either of them about the time when you first acquired your interest; do you know of any other transactions?

A. I know of no other transfers.

Q. Do you know how deep that shaft was at the time when water came in, of your own knowledge?

A. Not of my own knowledge.

Q. Do you know Mr. F. J. Bowman?

A. No, sir.

Q. When did you say was the last dividend you received?

A. August 2nd, 1886, and that was not earned. We borrowed the money to pay that dividend with.

Q. Do you know the amount of that dividend?

A. $8,000.

Q. The whole?

A. Yes, sir.

Q. What were the stated times for dividends?

A. There were no stated time. Whenever we had a surplus we divided, and sometimes we divided before we had a surplus. The owners were always very clamorous for dividends.

Q. State, as near as you can, the date at which the water came into the mine.

A. The latter part of August, 1882.

Q. The water was never controlled, you say, until after the
232 time when you bought out Nead, in February, 1883?

A. The water was not controlled until after February, 1883.

Q. These efforts that you speak of were made, then, between the latter part of August and the 1st of February?

A. Exactly; between that and the end of February.

Q. Do you know of your own knowledge what it did cost ultimately to supply the machinery to control that water?

A. Do you mean the amount of money that was spent on the pumps of all sorts and sizes?

Q. Yes.

A. About $12,000.

Q. Please state on what information you give the figures from $420,000 to $450,000 as the aggregate dividend paid by the Col. Sellers and Accident mines; how do you arrive at those figures?

A. From memory principally.

Q. Are you sure they are as large as $420,000?

A. I think so.

Redirect examination by Mr. McGINNIS:

Q. Mines generally have trouble with water, don't they; isn't it a very common thing with most mines?

A. Well, no, sir; not the most.

Q. Well, with a great many of them?

A. With a great many of them; yes.

Q. Pumping machinery is generally a part of the outfit of a mine, is it not?

A. That depends on where you had the mine. I know mines in that district where it is not.

Q. In that district?

A. In that district. In the Leadville district in the last five years nearly every mine must have pumping machinery to handle the water, though the mines discovered before that time required no pumps, as a rule.

233 Q. You say Mr. Whiting sold an interest about February, 1883?

A. Yes, sir.

Q. What interest?

A. A 64th in the Col. Sellers and a 64th in the Accident.

Q. To whom did he sell?

A. To J. J. Simmons, of Chicago, I think.

Q. A relative of Whiting's?

A. No, sir.

Q. For what price?

A. I don't know exactly, but in the neighborhood of $600.

Q. That is in February, 1883?

A. In February, 1883.

Q. Does Simmons still own that interest?

A. Yes, sir.

Q. The discovery of the iron pyrites and the indications of ore was communicated to you the last day of July, 1882, by Mr. Whiting, do you say?

A. Yes, sir.

At this point, by consent, the further taking of testimony in this cause was adjourned, subject to the convenience of counsel.

A. J. GERHARD.

MAY 10TH, 1887.

Parties met pursuant to agreement.

Present: E. C. McGinniss, Esq., on the part of the plaintiff, and Messrs. Eliot and Parsons, on the part of the defendant.

FRANK J. BOWMAN, sworn and examined, testified as follows:

(By Mr. McGINNISS:)

1 Q. State your name, residence, and relation to this case.

A. My name is Frank J. Bowman; I reside in St. Louis, Missouri; I am plaintiff in this case.

2 —. Are you acquainted with William F. and James M. Patrick?

234 A. I am.

3 Q. When did you first become acquainted with them, about when?

A. Several years ago.

4 Q. Did you have any business relations with William F. Patrick in regard to the Col. Sellers and Accident mines, near Leadville, Colorado, described in the petition in this suit?

A. I did.

5 Q. What was that relation and when?

A. I entered into a partnership arrangement with William F. Patrick, to the best of my present recollection, about January, 1882. It may have been February—January or February; that is my best recollection as to the time, in 1882, when at Leadville, Colorado, under circumstances about as follows: I had been there attending to some business for parties in New York. I had also been there attending to some business for William F. Patrick.

6 Q. In what way attending to business?

A. Legal business.

7 Q. As his attorney?

A. As his attorney. When the court business was through I took a ride with Mr. Patrick, and I think Mr. Wilson was along and we went to—as I now recollect the name—what was called California gulch to look at some mines as a matter of curiosity. Mr. Wilson pointed out some placer mines; I was particularly impressed with a mine that I think was then called the A. Y., and being informed by Mr. Patrick that there was an opportunity to purchase an interest in the property near to it or adjoining it, I told Mr. Patrick in substance that I thought it was the most promising thing I had seen.

8 Q. What was the name of that property near to it or adjoining it?

A. That is the property known as the Col. Sellers and Accident mines; and that I was willing if he would join with me or superintend the working operations, to go in with him and purchase

235 an interest and sink a shaft or shafts, whatever might be necessary, and explained to them my reasons for thinking that it would be a good property. He said he agreed with

me, and on our return to the central portion of the town, I think the same evening, we hunted up the parties and made with them a written contract.

9 Q. What was the name of these other parties or names?

A. I do not recall at this moment the name of but one; Stebbins was his name; I might recall the other if it was mentioned, but I do not recollect it just now. My recollection is there were two of them; perhaps more.

10 Q. The contract was made between you and Mr. Patrick on the one side and them on the other?

A. Yes, sir; that is my recollection.

11 Q. It was in writing?

A. It was in writing—that is, the contract that Patrick and I made with the other parties. I do not think the arrangements between Mr. Patrick and myself individually were reduced to writing. Those arrangements were in substance, as I have stated, that Mr. Patrick would remain there as he was there, a resident, and I had stopped at his house where he was living with his family in Leadville, as he did not wish to defray the expense, I suppose, of my stopping at a hotel while I was engaged for him, and I had to stop at his house.

12 Q. How long before that were you engaged as the attorney of William F. Patrick in relation to any matters *our* or near Leadville?

A. I think that was some time in October previous; he first came to me about his matters.

13 Q. October, 1881?

A. Yes, sir.

14 Q. So in December, 1881, you were his attorney in relation to matters there?

A. Yes, sir.

15 Q. Were you ever his attorney in relation to a claim known as the St. Louis mine or Miner Boy, of St. Louis?

236 A. I cannot tell without refreshing my recollection as to what particular matters. I recollect I was attorney for him in reference to those mines or some mines there.

16 Q. Your attorneyship with him was in reference to mines?

A. Yes; an interest in mining property. I would not undertake without reference to the papers or books to define which particular mine. I could do so, I presume, by reference to old papers.

17 Q. How long did you remain at Leadville after the contract between you and William F. Patrick was made and between yourself, Patrick, and Stebbins?

A. I think I left there the day following, is my recollection.

18 Q. The contracts that you mentioned were both fully formed before you left?

A. Yes, sir.

19 Q. Mr. Patrick had agreed to superintend?

A. He had agreed if we could adjust the arrangement with Stebbins that he, Patrick, would remain there and attend to the superintending of the mine, the opening of the shaft, or making a con-

tract for having it done, and he was to be a resident partner in the enterprise.

20 Q. Were you and Mr. Patrick to be equal partners?

A. We were each to contribute one-half and to have an equal interest in the matter.

21 Q. What part of the two mines were you to get for sinking the shaft?

A. A one-half.

22 Q. You were to get an undivided one-fourth?

A. We were to get an undivided half between us and were to be equal partners in both mines. I do not think anything was said about having a fourth, and were simply to be partners in the half interest we were to acquire under the contract and be equal partners.

23 Q. What, if anything, do you know from what Mr. Pat-
237 rick said to you as to his being well informed in regard to mining properties and how to develop them?

A. He told me that he was well informed in all matters relating to mining. He told me he had had very large experience and told me, I think, that he had held the position of assayer—State assayer—a commission as such, and had been making discoveries of mineral, and he claimed to be, if not the most expert man, one of the most expert mining men of Colorado.

Defendants' counsel objected to all parts of the answer as not responsive to the question.

24 Q. Did or did not Mr. Patrick claim to be a mining expert in regard to mines in that portion of Colorado?

Objected to as leading.

A. The claim which Mr. Patrick made and his representations theretofore had been to me that he was an expert mining man, and particularly so with reference to mining interests in and about Leadville, where he claimed to have had a very considerable experience.

Counsel for the defendant objected to the question and answer on the ground that it calls for a conclusion and the witness is giving merely a matter of opinion instead of a statement of what was said and done.

A. I meant to be understood as not saying in any manner my own opinion, and I do not understand it was called for, but simply a statement of representations Mr. Patrick had theretofore made to me concerning his skill in mining operations; it is with that understanding that I have answered as heretofore.

25 Q. Do you know whether or not Mr. Patrick did take charge in sinking a shaft in the Col. Sellers mine after you left?

A. Only from his representations to me. I know he did from representations which he made to me thereafter.

238 26 Q. When did you next go to Leadville after the making of these contracts of which you have spoken in the year 1882?

A. I cannot state without reference to memoranda. I could fix the date by reference to a check that I drew while at Denver. I think it was May 8th, if I am not mistaken in my recollection, that I was in Denver. I do not think at that time I went beyond Denver. By reference to the check I see I am correct in my recollection that it was the 8th of May, 1882, I was in Denver.

27 Q. Were you there during the year 1882, after the month of February, when the contract was made—at or near Leadville, Colorado?

A. I do not think I was at any time west of Denver after the day following that contract, or that I have ever been there since.

28 Q. Were you ever at Denver after May 8th, 1882?

A. I do not think I have ever been at Denver since May 8th, 1882. I have no recollection now of being there after that date.

29 Q. Then did you have any information as to what was being done in sinking the Col. Sellers shaft in 1882, except that which was communicated to you by William F. Patrick?

A. None except what I received through my partner, Mr. Patrick, who was to take charge of this matter, and did so.

30 Q. Did Mr. Patrick ever call on you for the payment of the part of the expenses of the sinking of that shaft?

A. He wrote me, as I recollect, from time to time as to it.

31 Q. Did you ever have a settlement with him during any time in the year 1882?

A. My recollection is that we made a settlement as late as June 19, I think it was, or about that date, of my portion that was due. I will explain by saying I know the latter part of June I usually made a settlement of all my matters where I was to pay money, as it had been my habit and custom since 1867 to be absent dur-
239 ing the whole of the summer from about the middle of June to about the middle of September, and my best recollection is I made a settlement before going away, about the 19th of June; it was some time about that time I settled with Mr. Patrick up to that date.

32 Q. Do you remember what that settlement was about?

A. I do not recall the details of it. I know that there was then—that is, my recollection is that there was something still due me from Mr. Patrick for moneys that I had advanced and expenses incurred in matters of his business.

33 Q. Other than the Col. Sellers property?

A. My recollection is other than the Col. Sellers property, and my recollection is that he had been calling for moneys before they were expended, to receive them in advance, and that I had objected to advancing moneys until they were due, and my impression is that I gave a note for a portion of it on that account that would fall due, I do not recollect what time, in 60 or 90 days, whatever time it may have had to run.

34 Q. You mean when settlement was made June 19th, 1882, you gave a note for the balance due to him?

Q. Yes; I am sure we had a settlement in full, and I settled up with him for what was due to him on account of the Col. Sellers mine, so that the matter should be settled until I should return from my fishing and hunting. I settled up just before starting off for the summer.

35 Q. Where was that settlement made?

A. My recollection is it was made here. That is my recollection, here in St. Louis. I did not expect to give my testimony without refreshing myself be examining the papers and letters that I have. If I could examine them I could speak more definitely about them, but I have not had the opportunity to do so, as it has been insisted by the defendant on the taking of my testimony now. They would not consent to a postponement so that I could look over my
240 papers and be more definite in regard to these matters.

Objected to as not responsive to the question.

36 Q. About how soon after the settlement of June 19th, 1882, did you leave St. Louis and what place did you go to?

A. My recollection is I must have left within a day or two.

37 Q. And where did you go?

A. That is, I know I left in June—the last of June, 1882—for Bayfield.

38 Q. Bayfield, where?

A. In the northern portion of Wisconsin. It then took a number of days to get to our place in the wilderness, which was by way of a wagon road after we reached Bayfield, Wisconsin, of 42 miles, and I find by my hunting memoranda that we killed deer on the 4th of July, 1882, and I of necessity must have left here soon after the 19th of June, and my recollection is I had been in camp with Oliver A. Hart a number of days prior to July 4th.

39 Q. When did you return from the woods of Wisconsin to St. Louis, about what time?

A. My recollection is I returned to St. Louis from the 10th to the 15th of September.

40 Q. Do you know whether or not William F. Patrick knew about the 19th of June that you were going to the woods of Wisconsin to remain during the summer?

Objected to as leading.

A. Mr. Patrick was fully informed by conversations that I had had with him at different times that I did not attend to business during the hot weather, but invariably spent my summers in the wilderness, fishing and hunting in northern Wisconsin or around Lake Superior.

41 Q. What arrangements did you take for receiving your mail while you were in the wilderness in Wisconsin?

A. I of necessity could make no definite arrangements, as our mail during that time was a matter of great uncertainty; sometimes

we would receive no mail for weeks at a time. I think some-
241 times as long as six weeks I have been at this wilderness camp without receiving a letter of telegram from any source, and sometimes when we would order our supplies from Bayfield or get them from St. Paul I would occasionally get letters sent in to me, but it was a matter of great irregularity and uncertainty.

42 Q. Did or did not Mr. Patrick ever make any overture to you to buy out your interest in the Col. Sellers and Accident properties?

A. He did.

43 Q. About what time did they commence and what were they?

A. My recollection is that they commenced in July and continued through July and August and September in the form of letters. At what dates I received them I am not able to state, for the reason that some of my letters addressed to me there I would receive even after my return to St. Louis. I therefore can't fix the dates, but I have a recollection that I have received and did receive letters from him that were addressed to me at points either Bayfield, Ashland, or St. Paul, but whether I received them at those points I cannot recall. As I stated, if I had had an opportunity to look over my papers and if this testimony had not been insisted upon by the defendants to-day I might have been able to fix those dates more clearly and intelligently.

44 Q. Did you finally agree to sell out your interest to him?

A. I did; and my recollection is on the 19th of October I made the conveyance to him of my interest. I could tell by referring to the papers exactly, but my recollection is it was some time in October that I conveyed to him. There had been a correspondence concerning it prior to that time.

45 Q. Did you ever, at any time or place, receive any information from Mr. William F. Patrick that ore had been discovered in the Col. Sellers shaft or mine in August, 1882?

A. No; I can speak with great positiveness, I think, in that
242 regard, for if I had received any information of ore being discovered I should not have transferred my interest in the October following.

Objected to as argumentative and as not being a statement of any fact.

46 Q. You received no such information from him or any one else?

A. I am sure I did not.

47 Q. Did you receive any information from him or from any one else of any discoveries of ore in the Col. Sellers shaft after the 10th of July, 1882?

Objected to as leading.

A. I did intend to answer and do now answer that I had not received any intelligence from him or information from him of the discovery of ore prior to the time when he obtained my conveyance about the 19th of October, 1882, and if I had I would not have made the conveyance.

Answer objected to as a conclusion of the witness and not a statement of fact.

The WITNESS: And I wish to state that I was in total ignorance of the discovery of ore in the Col. Sellers mine at the time of making that conveyance, not having received information from either Mr. Patrick or any other source.

48 Q. After your settlement in June 19th, 1882, did Mr. Patrick make any further demands of you for money which he said was necessary or had been expended by him in sinking the Col. Sellers shaft?

A. He did not after the 19th of June make any further demands on me for money. That was understood on the 19th of June that I was about to leave. He understood it and I did that I was about to leave for the summer, to be in the wilderness, where I did not attend to business matters.

49 Q. Prior to your selling out to him in October, 1882, was anything communicated to you by him or his brother, James
243 Patrick, as to the expenses necessary to continue the development of that property?

A. Representations were made to me to the effect—I do not recall the details—that it would require a number of thousand of dollars—I think about $9,000—to go down far enough to know whether the property was worth anything or not.

(By Mr. PARSONS:)

50 Q. Can you fix the date of that representation?

A. That representation was made to me after my return, as I now recall it, by James Patrick, who came to me on behalf of his brother Will.—James Patrick, one of the defendants in this case, I mean—and there was a letter of similar purport——

Defendants' counsel objected to the witness stating the contents of a letter, as no foundation has been laid for it.

WITNESS (continuing): —which I am not able to produce. My letters, a portion of them, were left at my former residence and are not in my immediate possession, but I hope to be able to have control of them that I may produce them. I was in hopes to have them at this examination, but it has been insisted upon it being proceeded with by the defendants before I have had time to complete the examination.

Defendants' counsel objects to the statement of representations made by James M. Patrick as irrelevant and incompetent, and also objects to the statement that James M. Patrick represented his brother William F. Patrick.

51 Q. State if at any time prior to the completion of the transfer of your interest in the Col. Sellers and Accident mines to William F. Patrick his brother James M. Patrick came into the negotiation; and, if so, in what capacity.

A. The transaction was consummated through James M. Patrick,

who came to me at my office and on my own papers, as I now recollect, wrote the request at my office that I would transfer my
244 interest to his brother William, and it was pursuant to what was then said and done by James M. Patrick that I made the conveyance of my interest, delivering the deed to James M. Patrick, as I think at that time he was acting or purporting to act in obtaining the deed for his brother William, and I delivered it to him—the deed conveying my interest—I am sure. This was about October 19, 1882, and I am sure that he carefully refrained from intimating to me that there had been any discovery of ore at the time of procuring my transfer.

Defendants' counsel objects to the statement that James M. Patrick carefully concealed the discovery of any ore as being the mere opinion of the witness and as incompetent and irrelevant, it not appearing any such statement was authorized by William F. Patrick or any such conduct was authorized by William F. Patrick, and the further objection to the statement of the witness that James M. Patrick purported to act for his brother, William F. Patrick; all of which is incompetent and irrelevant.

52 *W.* Did James M. Patrick at that time or at any time state to you, "Billy has written saying that he has struck a fine vein of silver ore and is very much pleased with it?" Did James M. Patrick ever tell you that at any time?

A. No; but, on the contrary, on my questioning him as late as October concerning the matter he represented to me that nothing had yet been discovered, but that Will. was taking his chances that he might thereafter find something. I was the more particular, as I did not know anything about the matter, to ask him concerning this matter when I returned and saw him in St. Louis, and before making my deed I wished to know that I was not being imposed upon.

The foregoing answer of the witness, or so much of it as refers to any statement made by James M. Patrick, is objected to by
245 the defendants' counsel on the ground that it does not appear that James M. Patrick was the authorized agent of William F. Patrick in or about the matter mentioned; that no fraud or misrepresentation is charged against James M. Patrick in the petition of the plaintiff, and as being incompetent and irrelevant, and, besides, that the statement of the witness is not a statement of a fact of a statement of any affirmative representations made by James M. Patrick, but is nothing more than the defendants' conclusion from the conversation had with James M. Patrick.

The WITNESS: I wish to correct if I made the error of saying "other than the statement of Mr. Patrick;" that the statements Mr. Patrick made to me, James M. Patrick, in October were in response to questions that I propounded to him as to whether anything had been discovered, and that "there was nothing in this but what is all right;" "you haven't found anything there in substance?" and the reply, "Oh, no; Will. is taking his chances on

that." That is the substance of the conversation. I can't remember the little details of it, but that is impressed upon my memory that I questioned him in that particular, and that that was his response.

Defendants' counsel objected to the last portion of the answer as not called for by any question, and, further, as incompetent and irrelevant and not in any manner binding on defendant William F. Patrick.

53 Q. When did you first learn that ore had been discovered in the Col. Sellers shaft in August, 1882?

Objected to on the ground that it is leading and, further, an assumption of facts not proven.

54 Q. I will put it in a different form. When, if ever, did you first discover or learn that ore had been found in the Col.
246 Sellers shaft?

A. Of my own knowledge, I do not know it yet. Of my own knowledge, I do not know that an ounce of ore has ever been discovered in the Col. Sellers shaft.

55 Q. When did you first get such information, if any?

A. I think on the day and since the institution of this suit, upon the knowledge and by the handwriting of Mr. William F Patrick and James Patrick, which is known to me; that it had been discovered and known to both of them as early as August, 1882.

Counsel for defendant- further objected to the statement of the contents of a letter or from information gathered from letters of the defendants, William F. and James M. Patrick, because no proper foundation has been laid for the introduction of oral testimony as to the contents of a letter or letters.

56 Q. I ask as to the time when you first got such information.

A. The first reliable information I received as to this matter was on the day I brought this suit—the first knowledge that I had that was satisfactory to my mind, or that I may *I may* say the first information that I had was on the day I brought this suit.

57 Q. When did you first get any information of any kind, satisfactory or otherwise, that ore had been discovered in the Col. Sellers shaft prior to the time you agreed to sell your interest to William F. Patrick?

A. I never received any such information of any kind prior to the time when I brought this suit.

58 Q. Which was on the 15th of October, 1886?

A. I do not recollect the date, but the record will show; I think that is the date. It was during the fall of 1886. I had no information prior to that time of it.

59 Q. How soon after you got such information did you bring your suit?

A. The same day.

247 60 Q. From whom and how did you get that information? I am not asking for the contents of letters, but from whom

and how did you get the information? Just give in a general way the facts and the letters will come in afterwards.

Objected to as leading.

The WITNESS: Do you wish me to state who I received the information from?

61 Q. Yes; what person and where.

A. I received that information from R. S. McDonald and T. Ward McManus and W. B. Wolcott.

62 Q. Where did you receive it?

A. I received it at the office of R. S. McDonald.

63 Q. In St. Louis?

A. In St. Louis on the day on which I brought this suit, and before leaving the room I drew the petition in this case.

64 Q. In what shape did that information come—by letters or otherwise? Of course, I am not asking for the contents of letters, but in what shape did that information come to you?

A. In the shape of what purported to be the statements of Mr. Patrick, his brother, one of the defendants in this case, and other members of the Patrick family, contained in written documents—letters and written documents.

65 Q. Prior to that time you had never heard of those documents nor had any information of what they contained?

A. I had not nor had never heard that they had discovered mineral before inducing me to part with my interest.

Defendants' counsel objects to the answer as incompetent and irrelevant and containing a conclusion of the witness and not stating facts.

66 Q. Do you know whether or not letters from these same parties bearing on the same subject have been discovered since
248 the beginning of this suit?

A. I have seen a number since—letters of both William and James Patrick.

67 Q. The existence of which you did not know when you brought this suit.

A. The existence of which I did not know when I brought this suit.

68 Q. What, if any agreement, did you ever have with Jim Patrick—James M. Patrick—in relation to any part of your interest in the Col. Sellers or Accident mines?

A. I have an impression that there was some talk of an arrangement at one time by which James M. Patrick could have a third of my interest by paying a certain amount of money therefor, and I am definite in my recollection that he did not pay me any money on account of the agreement thus made. I have searched my papers and memoranda for the purpose of refreshing my recollection as to whether he ever did pay anything so as to become entitled to any interest, and I find that he did not pay me anything on account.

69 Q. Prior to your conveyance on the 19th of October, 1882, to William F. Patrick of the one-fourth interest of this mine standing

in your name, did you ever make a conveyance of any part of your interest to James M. Patrick?

A. I never conveyed my interest to any person, as far as I have knowledge or recollection, except in the conveyance of the one-fourth interest about October 19th, under the circumstances I have stated, by deed to William F. Patrick; if I have ever done so I certainly have no knowledge or recollection of it.

70 Q. What agreement, if any, did you ever have with William H. Wilson in regard to any part of your interest in the Col. Sellers and Accident mines?

A. My recollection as to that is that at the time we took the trip up the California gulch that I have spoken of, on which Mr. Wilson accompanied us, wishing to sell me an interest in the prop-
249 erty, which proposition I did not consider favorably after I had expressed my willingness to go into an arrangement or contract with reference to the property in question—the Col. Sellers and Accident mines—Mr. Wilson said, "Well, you would never have seen it if you had not made this trip up to see my property," or something of the kind, and "You ought to let me in. What am I to get?" And I think I told Mr. Wilson, "Well, you are to get a good drink, or something of the kind," as we had stopped and taken a drink at an old log cabin, and in talking with him I said that I should have "no objection to it, provided you put your money up; but it takes money to get a mine," some money at least, and if you will put your money up in ten days I should be willing to let you have a small interest, but I do not recall whether I said a third or a fourth. It is possible I gave him some memoranda of like effect, but if I did I have no recollection of it now. However, he failed to pay his money. I know that, and I know that nothing came of it by his failure to pay it from the examination of memoranda that I have; I have refreshed my recollection in that regard.

71 Q. He paid you no money and you made him no conveyance?

A. That is my recollection; I am positive he paid me no money, and I have no recollection of making him any conveyance. Whether there is any memorandum made of an agreement that I have forgotten I do not recall. My best recollection would be that there is no memoranda or writing made of it. There may have been, however; I would not speak positive as to that; but I do speak positively that he forfeited his interest, whether it be a verbal or written contract, whatever it was, by a failure to pay within the ten days. That I know he did; I have been told; at least I have the statement of Mr. Patrick to that effect; William F. Patrick.

72 Q. What did you get for the conveyance of your inter-
250 est in the Col. Sellers and Accident mines to William F. Patrick?

A. What was represented to me to be about the value of my share of the old machinery that was there that could be utilized to go on and operate the mines.

73 Q. How much money did you get?

A. My recollection is that I got no money, but a simple payment of a note of some $280. That is my present recollection.

74 Q. What note was that?
A. That was a note given in June.
75 Q. June when?
A. When I made the settlement with him.
76 Q. June 19, 1882?
A. June 19, 1882.
77 Q. For $280-odd dollars?
A. For $280-odd dollars due in 90 days.
78 Q. And that note was returned to you by James M. Patrick?
A. That is my recollection that Jim brought it to me at the time he got the deed.
79 Q. And that was the consideration?
A. That was the consideration for which I made this conveyance.
Q. 80. And you received no money?
A. And I received no money, and my understanding was there was no mineral discovered and I was conveying away my interest in some machinery and stuff that could be utilized to go on in experimenting further to see if mineral could be found, and that I was getting simply as an equivalent the nominal sum of $280 or thereabouts.
81 Q. The statement of your deed that the consideration was $10,000 was not the fact, was it?
A. Oh, no.
82 Q. That was merely a formal statement?
A. Oh, yes; James Patrick stated to me in our conversation that it would be better for their interests hereafter to have it appear that something was paid for it, and, of course, it was immaterial to me to have it put that way.

Counsel for the defendant objected to the statement of
251 the witness as to any statement made to him by James M. Patrick regarding the consideration expressed in the deed.

At this point by consent the further taking of testimony in this cause was adjourned until to-morrow at 2 o'clock p. m.

ST. LOUIS, *May* 11, 1887.

Parties met pursuant to adjournment.
Present: As before.

The cross-examination of FRANK J. BOWMAN was as follows:

(By Mr. PARSONS:)

1 X Q. Mr. Bowman, you said in your examination-in-chief that you are acquainted with William F. Patrick and James M. Patrick and have been acquainted with them for several years. Can you state about how long you have known them?
A. I cannot fix the time. I knew their father and family for several years; had some litigation a number of years before; I do not recall whether that was for the sons or for the father before I went to Leadville.
2 X Q. Did you know them before you went to Leadville in the winter of 1882?

A. I knew them before the winter of 1882.

3 X Q. You stated at the time of your visit to Leadville, in January or February, 1882, that you went there for the purpose of consulting with William F. Patrick concerning some legal business you had for him. Is that true?

A. I think you misunderstood my answer.

4 X Q. Well, is that true?

A. I have answered, I think you misunderstood my answer.

5 X Q. Suppose you answer my question. Is that a proper
252 statement of your testimony-in-chief?

A. It is not entirely so.

6 X Q. At the time you were there you entered into the arrangement that you have spoken of with William F. Patrick for the acquisition of an interest in the Col. Sellers and the Accident mines, did you not?

A. I have stated in what manner I entered into the arrangement.

7 X Q. You have stated that you first called the attention of Mr. Patrick to the property known as the Col. Sellers and Accident mines, have you not?

A. I think I have not so stated. I have stated that I went up the California gulch for the purpose of looking, primarily, at some other property, and that while there we looked at this property and I have endeavored to narrate the transaction as it occurred.

8 X Q. Now, is it true that you first called Mr. Patrick's attention to the opportunity to purchase or acquire an interest in the Col. Sellers and Accident mines?

A. I could by no possibility answer whether his attention was ever called to it by any one else or not. I have no means of knowing.

9 X Q. As far as you are concerned did you first call his attention, or did he speak to you first about it?

A. The question you propound is not capable of being answered yes or no. The facts would better explain the matter. I went up California gulch looking at different pieces of property, as I say, primarily to look at some other properties that had been spoken of and talked about, and to take a general view of the country and so on, and we looked at the A. Y. mine, and as I now recall the mine I was favorably impressed with it and also as to the probability of the body of the ore extending in the direction of where the Col. Sellers and Accident mines were located.

10 X Q. Then it was the proximity of the Col. Sellers and Accident mines to the A. Y. that led you to think that it
253 would be a profitable investment?

A. Among other things. I do not say that was the only reason. I took a view of the different mines that had been located and gathered information as to the results that had been obtained.

11 X Q. Was Major William H. Wilson with you and Mr. Patrick in your trip up the California gulch on that occasion?

A. My recollection is that he went along; I cannot say that he was along with us, because the road and bridle-path at portions of the way was such that we couldn't be all together, and my recollection

of it is that Mr. Patrick and I were very little together during the trip. Some of the time we were all separated, scaling over snow banks.

12 X Q. As the result of that examination you made a contract, dated the 17th of February, 1882, with Robinson and Stebbins, did you not?

A. The observations which I made and the information which I obtained on that trip and from other sources, and the parties with whom I conversed, led me to enter into the partnership arrangement with Mr. Patrick which I have spoken of to develop that mine or to sink a shaft to find out if mineral was there.

13 X Q. The agreement was between you and Mr. Patrick on the one side—William F. Patrick—and the owners of the Col. Sellers and Accident property upon the other side that you and Mr. Patrick were to sink a shaft on the Col. Sellers lode to limestone or to bed-rock of limestone in place, unless paying mineral should be reached before that, was it not?

A. Whatever it was as made between Mr. Patrick and myself and Mr. Stebbins and his associated was in writing, and you would find the terms more explicitly set forth in the written agreement than I could state them from memory. The agreement as between Mr. Patrick and myself was that we would go in partnership.

254 14 X Q. I am not talking about that.

A. That we could go in partnership in that venture and that Mr. Patrick was to be the managing partner, who would remain there and attend to the business.

(That part of the answer which speaks of the agreement between the witness and Patrick is objected to as not responsive to the question.)

15 X Q. I now hand you a copy of an agreement which purports to have been made between Theodore C. Stebbins, Lyman Robinson, Samuel J. Glover, and Harvey Howard, parties of the first part, and William F. Patrick and Frank J. Bowman, parties of the second part, and will ask you to inspect it and state whether or not that was the agreement you and Mr. Patrick entered into with those parties on the 17th of February, 1882.

A. I could not speak positively of the paper that you produce in connection with your inquiry, If you will show me the original that I signed, which, I presume, you have or your client has, it will aid me to determine whether it is the same or not.

16 X Q. Isn't that a certified copy?

A. I have no means of knowing that. It appears that no one's signature is to the paper you are talking about, nor is there any seal, except the blank one, so far as I am able to see.

17 X Q. I will ask you whether the original sketch of the contract that was entered into between you and Mr. Patrick, William F. Patrick, with the owners of the Col. Sellers mine, was not drawn by you.

A. I can only speak from inference and my habit of doing business, not from recollection. It would be very much like me to put

down my views of how the contract should be made, or an outline of them in pencil, but I have an indistinct recollection, and upon that, perhaps, you could refresh it and make it very vivid; that there was some attorney, which, from recollection, I cannot
255 recall, who—some friend of Mr. Patrick's in Leadville—that had something to do with the preparing of the papers, or perhaps some friend of Mr. Stebbins—more likely the latter, I should infer, although I must say it is not a matter of very strong recollection. I recollect with great distinctness that I wanted to make the agreement or article in the agreement that I entered into with Patrick, that I would go in on equal shares.

18 X Q. I don't ask about that.

The WITNESS: But I cannot recall the particulars of the manner in which the contract you refer to was executed.

19 X Q. Please take notice that I did not ask anything about the manner in which the contract was executed, and will you now answer my question whether or not the original sketch of the contract was prepared by you?

A. I have answered as fully as my recollection at this time will enable my to do. If you could refresh my recollection I might be able to answer you more fully and satisfactory. As to the paper which was produced by you a moment ago, I think that my counsel has a copy, a certified copy of the agreement, and if you desire I can take the time to compare it.

20 X Q. I wish you to do so.

A. Without making a detailed comparison I cannot say that this printed copy is or is not a correct copy of the original agreement. I will be better able to testify as to this with the original before me, which I believe you have.

21 X Q. You stated a moment ago that you would compare it with a certified copy in the hands of your attorney, and then determine whether or not it was the agreement you made. Will you please do so now?

A. As an attorney I will, when desired, make the comparison. As a witness, I do not consider it within my province to determine as to the identity of the paper.

256 22 X Q. You volunteered the statement that you would.

Mr. MCGINNISS: We have not got a certified copy of it. I thought at first that we had.

23 X Q. Now, I take it as a matter of independent memory that you are able to state, having your memory also refreshed by an inspection of this copy of the agreement, whether that is a copy of the contract you and William F. Patrick made with the owners of the Col. Sellers and Accident mines?

A. I cannot from memory state the terms of the contract which Mr. Patrick and myself jointly entered into with Mr. Stebbins and his associates concerning the Col. Sellers and Accident mines. If, as you state, or as I understand you to state, the original is in your possession or that of your client, it would refresh my recollection to see it. The paper I signed would refresh my recollection more than

a written copy of what purports to be the contract. There is nothing about that to refresh my recollection.

24 X Q. Does an inspection of the copy furnished you, and which is copied in the answer of the defendant, enable you to remember in any manner the terms of that contract?

A. I don't think I have read the contract as set forth in the defendants' answer.

25 X Q. Do you recollect that one of the provisions of that contract was that you and Mr. Patrick were to sink a shaft on the Col. Sellers or Accident lodes to mineral or to bed rock or limestone in place, upon the performance of which you were to receive a deed for one-half of that property?

A. I restate to you that I cannot recall the terms of that contract. If you will produce that contract it might refresh my recollection as to that.

26 X Q. I produce now a copy of it, and I ask you to read it carefully and then state whether or not the contract that
257 you made and Mr. Patrick made with the owners of the Col. Sellers mine contained the provision that I have stated in my last question.

A. I must decline to refresh my recollection by a paper that is not shown to be a true copy of the original; it might mislead rather than aid to a correct recollection.

27 X Q. Will you please examine it and state what your best impression is as to the terms of the contract after being refreshed by reading that paper?

A. I will examine the original, from which you have stated your answer was prepared, with great pleasure, if you will produce it, but I decline to examine any papers that purport to be copies until the identity of such copies has been established.

28 X Q. I will state to you that I have not with me the original contract of the 17th of February, 1882, but that I have what I supposed was a certified copy. Do you now decline to inspect either the copy presented to you or the copy set forth in the defendants' answer for the purpose of refreshing your memory?

A. Most certainly; while it is admitted it is in your power to produce the original, to which I was a party and to which my handwriting would appear, and perhaps though I do not recolleet, some portion of which may be in my handwriting that would naturally refresh my recollections, whereas a printed paper newly prepared would not tend to refresh my recollection so much as it would to see the original paper to which I was a party before.

29 X Q. Do you know anything as a matter of independent memory of any of the terms of that contract?

A. The specifications of the contract from memory I would not undertake at this period of time to narrate with distinctness. I recollect in a general way that the expenses of sinking a shaft were to be borne by Mr. Patrick and myself, and that for so doing we were to receive and were entitled to a one-half interest in the property.

258 30 X Q. When, at what stage of the sinking of the shaft, were you to receive your deed for one-half of the property?

A. I cannot state from recollection as to that; I may have an impression in my memory, but the paper will speak for itself.

31 X Q. You state in your complaint that you and W. F. Patrick purchased together a one-half interest in the Col. Sellers and Accident mines upon the terms and conditions that such half interest should be conveyed to you in consideration of certain moneys expended for development of the mines, one-half to be paid by each; now can you state in what manner and on what terms you purchased this interest from the owners of the mines?

A. That will be clearly shown in the original contract, which I believe is in your possession or in Mr. Patrick's.

32 X Q. I ask you to state it as a matter within your own knowledge.

A. I decline to testify as to the contents of that which was put down in writing.

33 X Q. Will you say you have no recollection on the subject?

A. I do not so state.

34 X Q. Have you any recollection on the subject?

A. I said that I had an impression concerning the matter, but as it was a matter all detailed in the contract that I would prefer the contract to speak for itself.

35 X Q. We would prefer you to state what knowledge you have upon the subject, independent of the contract; do you decline to do it?

A. I do not feel called upon to testify as to the contents of a paper which you have here admitted that you had control of or power to produce.

36 X Q. I ask you again do you decline to give us what knowledge you have on the subject, independent of that contract?

A. I am not declining to do anything in my power to do, that as a witness it is my duty to do or that I can properly do, but
259 as to giving you or attempting to give you the details of a written contract from memory, when you have the power to produce the original contract, I certainly decline to do.

37 X Q. Will you give us your best impression and the best recollection of the terms of that contract?

A. I will do so if you will permit me to refresh my recollection by the paper I signed at the time and which you have the power to produce.

38 X Q. Will you do so without our permitting you to inspect the original contract?

A. Understanding the rule to be that when a witness is asked in reference to a paper which is in the possession and in the power of the party to produce that it is the right of the witness if questioned concerning that paper to have it before him, I shall certainly insist that I have the right to see that paper out of common fairness to a witness.

39 X Q. I ask you as a matter within your own knowledge whether the contract or a copy of the contract which is set forth in

the answer of the defendants is the contract you made on that occasion.

A. I believe I have stated to you to my best recollection that I have not read the contract which is set forth in the answer of the defendant.

40 X Q. Will you read it and then answer the question? I now present to you the copy of the contract in the answer.

A. It would be impossible for me to answer that question for this reason: I see the paper which you have set forth as a contract refers to the same subject-matter and conforms generally to my recollection of the subject-matter of it. Its special terms, provisions, limitations, and details I cannot speak of and decline to do so while it is within your power to produce the original.

41 X Q. I will state to the witness that I supposed I had sent the original contract to Messrs. Cunningham and Eliot, but I find that by some oversight I omitted to do so, and that it is not within my power to present the original contract at this time,
260 but I desire to call the attention of the witness to some of the terms of this contract and ask his knowledge of them as a matter of independent memory.

Mr. McGINNISS (to the witness): Give your best impression.

The WITNESS: Anything I know I will, but I cannot recall the details of a contract four to five years ago.

42 X Q. I will ask the witness whether the contract made by you and William F. Patrick with Messrs. Stebbins, Robinson, Glover, and Harvey Howard, and dated on the 17th day of February, 1882, and signed and acknowledged by you on the 6th of March, 1882, contained this stipulation, viz: "That a certain deed of conveyance executed on the 17th of February, 1882, conveying an undivided half interest in the Col. Sellers and Accident mines and deposited with C. C. Parsons, to be delivered to you and said Patrick when you shall have sunk a good and substantial shaft in and upon said premises to limestone in place or bed rock, unless pay mineral is found in said shaft before reaching the limestone in place or bed rock." What do you say as to the contract containing that provision?

A. The contract was in writing and will speak for itself is my only answer to the question you propound.

43 X Q. Do you decline to state your best recollection or impression whether or not that contract contained that provision?

A. As it is wholly immaterial what my impression or recollection is, I decline to state; it is immaterial; the paper will speak for itself, and I decline to testify as to such immaterial matters.

44 X Q. Do you claim it is within your province to determine the materiality or competency of testimony?

A. I claim that as a witness I am here to answer questions that are relevant to the case, and that I should not sit here to be interrogated and asked to repeat a contract from memory that is
261 not destroyed and that is within the power of the parties to the suit to produce. They are seeking to have a memorized copy of it, which must be to some extent inaccurate.

45 X Q. Is it on the ground that you as a witness consider the question and answer called for as irrelevant that you decline to answer it?

A. It is because I consider it an improper question to propound to me as a witness, well knowing the rule to be that if you wish to interrogate me concerning a paper not lost you must produce that paper to me, and that that is a fair, legal, and proper manner of examining a witness as to a paper.

46 X Q. You think that you are not called upon to answer any questions within your knowledge independent of any paper?

A. I have stated that my reason for wishing you to proceed in the ordinary and legal manner is because I have not a distinct and positive recollection as to the details of that contract.

47 X Q. Will you please take notice that I have not asked you for any distinct and positive recollection of the contents of that contract?

A. I have answered that contract which you say is a contract or a copy of the contract as made at the time and place you have indicated seems to me to be in general purport and terms similar to the contract as I have it in mind, but as to answering your matters of detail or as to what the specifications in that contract were I cannot do it with positiveness, under oath, as a witness or say that I am willing to attempt to do it and particularly as it can be so readily produced.

48 X Q. Now, I call your attention to the fact that I have not asked you for the details of the contract, but I ask whether you have any recollection or memory or impression as to whether or not the particular provision I have called your attention to was in that contract.

262 A. I will restate again that I have a recollection aside from any paper that I made with William F. Patrick, jointly as my partner in the transaction, a written contract with certain parties—whose names I do not recall further than that I think one was Stebbins—by the terms of which Mr. Patrick and myself were to furnish the funds to sink a shaft—an exploring shaft or sinking shaft—whatever it may be known to be in mining parlance—upon the Col. Sellers mine or Accident property. What the particulars of that contract were I have not so distinctly in mind, but I am not willing to state them without the paper before me.

49 X Q. Now I will ask you what your understanding was at the time you made that contract of the object of requiring you and Mr. Patrick to sink to limestone in place or bed rock unless mineral was reached before that.

A. I have no distinct recollection as a matter of memory that there was such a provision in the contract, and hence I cannot have a recollection as to the reasons why it was in.

50 X Q. Do you know as a matter of fact in the Leadville district that the mineral is found lying between a hanging wall of porphiry rock and limestone as a foot wall?

A. As a fact, I don't know anything about how the mineral is found, and I never had any practical experience in mining. I en-

trusted all matters of mining details to Mr. Patrick. The matter of the contract at that time I will venture to say I pretty well understood when I made it—that is, the general scope and purpose of what we had to do I understood. The details of the mining arrangements I relied on Mr. Patrick, who professed to be an expert in those matters, to attend to.

51 X Q. Did you understand what was meant by that part of the contract by which you agreed to sink a shaft to limestone in place or bed rock?

A. As I told you, I have not a *distant* recollection of whether that was or was not in that agreement, and I cannot answer
263 it from a mere vague recollection as to what my understanding of it was at the time.

52 X Q. Now, do you know any of the terms upon which you purchased an interest in the Col. Sellers and Accident mines, as alleged in your bill of complaint?

A. I have already answered that I have a recollection distinct that Mr. Patrick and myself were to jointly pay the expense of sinking a shaft for finding the mineral, and that I entered into an agreement with him by which he was to stay there and superintend it, and I was to furnish whatever money——

53 X Q. I did not ask that.

A. Wait until I get through. I am telling what I recollect. You asked——

54 X Q. I object to your answer as not responsive to the question asked about the terms of the contract.

A. Wait until I get through and don't interrupt me. I say as to the details of that contract I cannot speak of them from recollection.

55 X Q. Did you know, as a partner of Patrick's in mining enterprises and investing large sums of money to be expended for the purpose of finding ore, did you or not know the conditions upon which you were to obtain your deed for that property?

A. I know that we had—I have a recollection that we had those things determined and put into a written contract, and I relieved my mind from carrying the terms of the contract in my memory, and I can't repeat them from memory.

56 X Q. Then do I understand you to say that, as a partner of Mr. Patrick's and engaged in mining enterprises that would involve the expenditure of large sums of money, that you did not charge your memory and do not to this day know when your contract was to be considered performed?

A. You understand me to say, if you understand me correctly, that whatever was to be done in that regard I was careful
264 should be put in writing before we done anything, and that it was put in writing and signed by the parties.

57 X Q. Now, Mr. Bowman——

A. Wait until I get through. And that I relied on that writing to retain the terms of the contract instead of my memory, which is crowded with a thousand other things.

58 X Q. Mr. Bowman, your answer is not responsive to the question, and that question will be repeated a dozen times if necessary

to get an answer responsive to it. Now, I ask you as a matter of memory, or ask you rather, are you prepared to say in so important a mining venture as this was, in which you were required to expend large sums of money, that you do not know what was contained in that written contract or the conditions that were imposed upon you or when that contract was to be considered performed?

A. My answer to that is in a matter of that importance I thought it should be reduced to writing, and that I should not entrust it to human memory, and it was reduced to writing, and that if you desire to know the terms of it you have it or your client has it in his possession according to your statement made here to-day, and it is within your power to produce it, and that would be better evidence, much better than I can give you from memory.

59 X Q. Now, I would ask you whether, conceding the contract was reduced to writing and conceding that it is our power to produce it, you still say that you have no recollection independent of that contract as to when that contract was to be considered performed by you.

A. I have no definite or specific recollection that I could as a witness swear to as a fact what were the terms of that contract in the matter of which you speak.

60 X Q. I will ask you, then, if you have an indefinite and non-specific recollection of the time when that contract should
265 be considered performed by you and Mr. Patrick so as to entitle you to your deed.

A. Not so positive as would be of any value.

61 X Q. Now, I have not asked you for any positive recollection. I ask if you have any recollection on the subject.

A. I have simply a recollection to the extent that something was said about it, and that the provision respecting it was embodied in a written contract. What it was I do not recollect and cannot tell at this time.

62 X Q. Will you state, then, that you have no recollection upon the subject except what—or no recollection on the subject, and cannot state anything on the question as to when that contract should be by you performed except what is contained in the written contract?

A. I do not think that my answer would be quite as broad as your question seems to make it.

63 X Q. Well, suppose you make it narrower, then.

A. You may consider it narrower.

64 X Q. Well, sir, if you have any memory on the subject I would like to have it.

A. I have indicated my memory upon the subject which you have indicated.

65 X Q. You have said that you have no positive, distinct recollection of the time when that contract should be by you performed, or by you and Patrick, to entitle you to your deed for one-half of it. Now, I ask if you have any sort of impression or recollection independent of any contract, whether positive and distinct or not.

A. I have said, and I repeat now, so as to avoid any misunder-

standing, that I have not that clear and definite remembrance and recollection of specific matters in that contract to which you have called my attention that I could repeat that contract from memory nor repeat them from memory.

66 X Q. Now, then, I wish to call your attention to this fact——

A. (Continuing.) I have a general, vague——

266 67 X Q. No; wait a moment.

A. Not until I am through; I will not wait. I say I have a general, vague, and indefinite recollection as to these matters, but not of that clear and positive nature that I can repeat that contract at this late day from memory, nor will I attempt to do so.

68 X Q. Now give us the vague, indefinite, and indistinct recollection you have as to when that contract was to be performed.

A. About the time when it was to be deemed to be performed was the date which was put down, indicated in writing, and subscribed to by the parties, and which you have in your power to produce if you desire to know.

69 X Q. Do you say that contract in writing named the date the contract should be considered performed?

A. I say whatever was put down and whatever was agreed upon between Mr. Patrick and myself on the one part and Mr. Stebbins and associates on the other was put down in that writing, and that there were no agreements between the respective parties so far as I have any recollection—I mean with Patrick and Bowman on the one part and Stebbin and associates on the other—but what were embodied in writing and put down and signed.

70 X Q. Now I will ask you again and shall keep on asking you whether you have a vague, indefinite, and non-specific impression to give as to the terms of that contract.

A. I decline to give from memory, without the paper before me, the terms of the contract. I have stated what my general recollection of that contract was. I can restate those, if you desire.

71 X Q. Have you stated what your general recollection was as to the time when that contract was to be performed?

A. I have stated my recollection was there was something said as to that, and that the particulars of it were embodied and put down in the contract.

72 X Q. Do you recollect as a matter of vague and indefi-

267 nite impression or memory that that contract was to be deemed performed by you and Mr. Patrick when you sunk a shaft to limestone in place or bed rock unless mineral should be reached before that?

A. I cannot state positively so as to be able to affirm it from recollection that the term "limestone" was used in the contract; it may have been; some other stone may have been named. I probably knew at that time, undoubtedly did, and the paper probably has exactly what I then knew.

73 X Q. Now I ask whether you have seen, since the commencement of this suit, a certified copy of that contract about which we have been inquiring.

A. I have not further than to see the outside of the paper that

Mr. McGinniss had, my attorney, which I think he told me when he held it in his hand was a copy, but I do *now* know that he said a certified copy.

74 X Q. Did you take no pains to examine that to inform yourself of the terms of the contract after suit was brought?

A. I have not, certainly.

75 X Q. Do you know that contract — is in his possession — a certified copy of the contract about which we have been inquiring?

A. I understand from him that it is not, and that he was mistaken in thinking that it was.

76 X Q. Did you state awhile ago that your attorney had such a copy?

A. My attorney informed me that he had a certified copy, but upon examination since then he has informed me he was mistaken in so informing me.

77 X Q. Do you know, as a matter of fact, whether he has ever had since the commencement of this suit a certified copy of that contract?

A. I have already answered the only knowledge I had on the subject is his showing a paper in his hand and speaking about getting the papers in the case together, of which he has charge and management, and that he said to me that he had got, I don't know whether he used the word " certified " copy or not, but a copy of the
268 contract. I know you have stated since you have been here examining me that this copy, which appears as set forth in the answer, was taken from the original, but whether it was or not I do not know.

Counsel for the defendants moves to strike out the last statement of the witnesss as not being responsive to any question and as not called for by any question of counsel for the defendants and as being irrelevant and incompetent.

The WITNESS: I can't reconstruct a contract made four years ago as to the details, to save my soul.

78 X Q. I will ask you, Mr. Bowman, whether you can state from the copy of the contract now presented to you, which is set forth in the defendant's answer—do you know that to be a correct copy of the original contract? And, if so, you can state when that contract was to be deemed performed by you and William F. Patrick so as to entitle you to a conveyance from the owners of the Col. Sellers and Accident mines or a deed.

A. I have no recollection or remembrance of that contract in those particulars. The contract will speak for itself.

79 X Q. Now, I will ask you if you know whether or not a contract was made by you and William F. Patrick with Lyon Robinson and T. C. Stebbins and Samuel J. Glover and Harvey Howard, dated the 17th of February, 1882, and signed by you on the 6th of March, 1882, by which, for certain considerations therein expressed, you were to acquire a one-half interest in the Col. Sellers and Accident lodes on the performance of that contract.

A. The question you are propounding I cannot answer by yes or no.

X Q. 80. The question is simply whether you know a contract of that kind was made.

A. I can say I know a contract was at some date—which will appear by the contract, but which aside from it I cannot give—

269 entered into between Mr. Patrick and myself, on the one part, and a man by the name of Stebbins and his associates, whose names I do not now recall, on the other part, by which we were—that is, Patrick and myself—jointly to sink a shaft on the property known as the Accident and Col. Sellers mine-, and for what we were then to do we were to receive a half interest in the property, and there was some arrangement made about putting up a deed in escrow or on deposit, or something of the kind, to Patrick and myself for such half interest. That is about the scope of my recollection as to this matter.

81 X Q. How long was that deed to remain in escrow?

A. The contract, my recollection is, specified the time, but what it was I am not able to say.

82 X Q. What were you to do under that contract?

A. My general recollection and impression is that we were to have a shaft sunk, but the particulars are set forth in the contract, and what they were I do not at this time remember.

83 X Q. Was the shaft to be sunk to mineral?

A. The particulars are set forth in the written contract, and what they were I do not remember now. I remember the general purpose and object was to sink the shaft to find mineral. I remember that much very distinctly.

84 X Q. Have you never since the making of that contract had it in your possession or a copy of it?

A. I think that I had a copy of that contract. I found some memoranda which would indicate that I had a copy of it before me in some correspondence, but whether I retained it after Mr. Patrick procured me to part with my interest on the 19th of October I do not remember.

85 X Q. Do you know what became of it?

A. I do not.

86 X Q. Have you got it in your possession now?

A. As far as I know, I have not. I looked to see if I had it, and I did not find it.

270 87 X Q. Now, then, I understand after making or perhaps before making that contract that you and William F. Patrick made an agreement by which you were to share equally in the profits and burdens of the contracts made with the owners of the Col. Sellers mine. Is that true?

A. We were to be joint partners in the venture.

88 X Q. You were to pay one-half of the costs and expenses of developing the property, and also of obtaining patent titles to the property, were you not?

A. Mr. Patrick and I were to share equally all expenses connected

with that transaction and to repa between us all the benefits accruing from it.

89 X Q. And to share equally all the burdens and expenses on the contract?

A. My understanding was to share alike all profits and losses connected with it, as we were partners.

90 X Q. In that sense of the term equal partners?

A. Equal partners.

91 X Q. Bearing equal burdens and sharing equal profits?

A. With this exception—with this understanding, that Mr. Patrick was to be a resident partner there and without charge to me was to superintend the sinking of the shaft and to let the contracts for that, and there were some things I was to do here in reference to signing papers, I think to get them signed or something of that nature that I was to do, and he was not to charge me anything for what he did, and any advise that I gave or any assistance in any way, legal services or things of that nature, I was not to charge for. We were not to charge each other with anything.

92 X Q. And he was to manage the property and developing and superintend the developing of the mines with- any charge to be made by him for his services in that respect?

271 A. I did not understand that we entered into a partnership to the extent you have now indicated by your question, though I may misapprehend your question. My understanding is that we entered into a contract by which we were to sink a shaft for the discovery of mineral on certain terms and to receive our title when the mineral was found, and what was to be done after that by way of developing and operating the property I do not know. I cannot say now what was the agreement as to that.

93 X Q. Was there any agreement whether Mr. Patrick should be entitled to compensation for his services in superintending the development of that mine?

A. He was not to have under our arrangement, as far as I now recall any compensation other—to add further—as the idea was as expressed between us at the time that he would let that out by contract to parties who would sink the shaft; there was some talk between us as to parting with some interest in getting somebody to sink a shaft for an interest if we secured our agreement.

94 X Q. Now, I will ask you whether at the time or shortly after the time that this contract was signed, you entered upon the performance of that contract by sinking a shaft on either the Col. Sellers or Accident properties.

A. My knowledge of that is derived from Mr. Patrick's representations and not from my own personal knowledge.

95 X Q. Did you know at or about the time you commenced work or prior to that a location had been made over the same ground by parties claiming the right to hold the ground under a location known as the Little Hope lode?

A. I can't say now that I recall the name that you suggest.

96 X Q. Did you know anything about what were called jumpers

locating a claim on the land covered by the Accident and Col. Sellers?

A. I had some reports from Mr. Patrick as to the attempted
272 interference on the property that I remember distinctly.

97 X Q. That was a subject of discussion between you and Mr. Patrick, was it not?

A. It was a subject of correspondence rather than of discussion.

98 X Q. Now, do you know when that was?

A. I have refreshed my recollection in reference to his letters on that subject recently, and that is why I speak with more assurance as to it or recollection.

99 X Q. Do you recollect a contest with the jumpers commenced just about the time you commenced the performance of your contract?

A. So far as I can gather I think it was some time after, but just what that period of time was I can't say.

100 X Q. Can you state when you commenced the performance of your contract by sinking the shaft on the Col. Sellers or Accident properties?

A. I can't state the date from memory.

101 X Q. Was it in the spring of 1882 or shortly after the date of that contract?

A. It was after the date of the contract.

102 X Q. Shortly after, I said?

A. It was certainly before June, because then work had been commenced and settlement made of moneys which he claimed to have expended.

103 X Q. Now, I ask you how much interest you were to obtain individually in the Accident & Col. Sellers when you did perform that contract made with the owners of the Col. Sellers and Accident mines.

A. I was to obtain jointly with Mr. Patrick a half interest.

104 X Q. That would be a one-fourth interest to you?

A. It would be a joint half interest with William Patrick, my partner.

105 X Q. In your complaint you allege you held a one-fourth interest?

A. It would be mathematically, deducting a half of a half, which would be a fourth.

106 X Q. Now, do you say you held that one-fourth in-
273 terest down to the time you conveyed the same to Mr. W. F. Patrick, on the 19th of October, 1882?

A. So far as I have a recollection, I never made any conveyance of that 4th interest until I was induced to do so on the 19th of October, 1882, in manner as I narrated yesterday.

107 X Q. Did you ever make any assignment of any interest in that contract prior to the 19th of October, 1882?

A. My recollection is I made no assignment of any portion of my interest prior to that time, so far as I now remember, other than a conditional arrangement that if certain parties would pay certain

moneys they might have an interest. I possibly may have done something of that kind.

108 X Q. What parties and what moneys were to be paid as a condition or a consideration for a conditional assignment of an interest in that contract?

A. As I narrated yesterday, there was some talk; whether it was put down in writing or not I do no- remember now, or memorandum made of it; that Mr. Wilson, whose first name I do not recollect——

109 X Q. William H. Wilson?

A. It may be; I do not know; they called him Col. Wilson, I know. I can describe his personal appearance, but I cannot give the initials of his name.

110 X Q. Was that assignment made as stated by you in your examination-in-chief yesterday?

A. The assignment was made on the 19th of October, as stated by me in my examination-in-chief to Mr. Patrick.

111 X Q. I am not talking of that.

A. I am not aware that I spoke of any other assignment yesterday.

112 X Q. I asked whether the arrangement you have spoken of that you had with William H. Wilson was done in the manner in which you spoke yesterday, or whether there was such an arrangement as you spoke of yesterday in your examination-in-chief.

274 A. I spoke of it yesterday, as far as I have a recollection, but you cannot have understood me to use the term "assignment" which you just made use of.

113 X Q. Suppose I say it is not an assignment. The arrangement, — I understood you yesterday, was that William H. Wilson should have a certain interest in your interest in that contract, provided he paid some money within a certain time; 10 days, was it not?

A. My recollection, as I stated, had been refreshed upon that by some letters, and I find from representations made by William F. Patrick that he did not pay what he was to pay within ten days, and if he had any pretense of claim it was vitiated and void.

114 X Q. State what the arrangement was that you had with Major Wilson.

A. I cannot state it more particularly than I stated it yesterday, but I will restate it if you wish.

115 X Q. I wish you would.

A. My recollection is that there was some talk with Mr. Wilson as to the effect of what he should get or how he should get in or something of that kind, and I said, "Well, the way to get into a mine or to get a mine is to pay some money, and if you want to put up something on this matter within ten days why I would be willing to let you have an interest. I have a recollection of something of that kind occurring, but whether we put anything in writing concerning it I cannot recall. We may have done so and may not. I have refreshed my recollection by reference to Mr. Patrick's letters to the effect that Mr. Wilson did not pay anything and was not en-

titled to anything for that reason. I do not know that, however, only from statements of Mr. Patrick himself—William F. Patrick.

116 X Q. What amount was Wilson to pay you in ten days for an interest in your contract?

A. I do not recall. I have no recollection on the subject,
275 because, as I say, my recollection of the fact is that he passed out from it by not paying. That is my recollection as I have refreshed it from letters. I cannot recall the details of it.

117 X Q. Was a sum fixed by you and agreed upon between you and him as a sum that he should pay within the next ten days after this agreement?

A. Well, there was evidently and must of necessity have been some arrangement, I mean some indication of what he was to pay, but what the amount was I can't recall now.

118 X Q. Wasn't he to pay simply his proportion of the expense to perform that contract, and his proportion to be determined by the interest he had in the contract?

A. There was, as I recollect, something about his putting up money within ten days, and, further, that is impressed upon my mind by the representations of Mr. Patrick that this man Wilson was no good, and that he would not take much stock in what Wilson would do, and that he was a good man to have his money from.

119 X Q. I am not asking about the representations of Mr. Patrick. The question is, What was the understanding between you and Wilson as to how much he was to pay and in what manner he was to pay for an interest in that contract?

A. I repeat that I cannot from memory give the particulars, and, indeed, it is only a general impression concerning which I have spoken. I had forgotten until my memory was refreshed about it that Wilson had anything to do with it; I mean that I had any talk with Wilson in regard to it, but on looking over some letters my memory is refreshed to the extent that there was a man named Wilson, and that he was a man who was represented to be a speculator, but as he passed out of the transaction it all passed out of my memory, so far as I was concerned.

120 X Q. Now, I will ask you again to refresh your memory whether or not the agreement you had with Wilson—was not
276 that in consideration of his having secured this contract for you that he was to take an interest in your interest in the property and to pay his proportionate share of the expense of developing that contract and of performing that contract?

A. I do not recollect anything of the kind you indicate, and I would be of the impression it was otherwise, from the fact that Mr. Wilson recently stated to me that he demanded a compensation from the other party and he was attempting to explain to me how it was, but whether it is so or not I do not know; but about his getting $2,500 or them agreeing to give him something of the kind, now, I should be of the impression that there was something of the kind from what you indicate, but I may be wrong; I do not remember.

Counsel for the defendant- moves to strike out all that portion of

the answer of the witness which refers to a statement made to him by Wilson as not being responsive to the question and as irrelevant and incompetent.

121 X Q. Now, Mr. Bowman, I present to you a letter dated May 15th or 13th, it is hard to tell which, dated St. Louis and written in St. Louis, addressed to William F. Patrick, and I ask you whether it is in your handwriting.

A. That is my handwriting, except the words " Frank J. Bowman, May 13, 1882." That is not in my handwriting.

122 X Q. That is mine. Nobody claims that it is yours.

A. That is my handwriting and my signature.

123 X Q. Now I will ask you whether the statements contained in this letter as follows: " Wilson made a claim (all Leadville seems to be a claim) for an interest in the Col. Sellers and Accident. I yielded to his request as it was my duty to do so, and said that he could name the interest he wished to represent, and he named the interest and promised his share of the money you were to
277 collect of him, or forfeit his claim for non-payment." Does that indicate to you the terms upon which you agree to make an assignment of a portion of your interest to Major Wilson?

A. No; that is just according to my recollection of the matter that there was something, some swimming arrangement, in which he made a claim, as I mean in that language, "All Leadville seems to be a claim," and, as you will notice further on in the letter, some lunatic is seeking $500 from Patrick and myself in another mine and that accounts for the expression "All Leadville seems to be a claim." I regarded it as a bogus claim, but that if the man was willing to put up any money he might do so. That is as I recollect the matter. I have not seen the letter since I wrote it, but it is as I recollect the circumstances.

124 X Q. Then your recollection is that this was a sort of bunkum claim and that you yielded to it without caring to dispute it?

A. My recollection is that it came up, as I have indicated yesterday and to-day, by Wilson wanting to get in; that he rode with us that day through the gulch and expressed a wish to get in and that I had told him—(I will have to explain by saying that Patrick had represented him as a kind of a bogus character, and I didn't know him except from this representation as a bogus fellow and without money, who was around town and would not pay for anything)—and I had said to him, on Patrick's representation that he was that kind of a man, who wouldn't put up any money, " Mr. Wilson, when you want to put up any money put it up," but whether I gave him a memoranda representing it I do not remember. My memory is as before on the matter.

125 X Q. Does this letter show to you that you were mistaken in saying that he was to pay a certain sum of money in ten days or forfeit his interest?

A. No, no; it don't show that I was mistaken in that.

126 X Q. Don't it show that he simply promised to pay his
278 share of the cost in developing that property?

A. I have not read the letter through. I could answer the question better by reading the letter as to what it shows. (Witness reads the letter.) After reading the letter I will state it confirms my recollection that this gentleman, Mr. Wilson, whom Mr. Patrick then represented to me to be a kind of impecunious cuss, who had been wanting to come in and pay some money. I don't know anything about him except on Patrick's representations as to his then status. I think he had formerly been in St. Louis. My knowledge of him was from Patrick at that time and from his representations, and I formed a very poor opinion of Mr. Wilson's ability to pay anything, but, as I recollected it yesterday and do to-day, I told him that if he would be on hand with his money and pay that he might have an interest. I do not recall now nor does the letter enable me to state what the amount of the interest was.

Counsel for the defendants moves to strike out the statement of the witness as to the representations made to him by William F. Patrick and the statement of William F. Patrick concerning Mr. Wilson as not responsive to the question and as incompetent and irrelevant.

The WITNESS: I wish to state my reasons for referring to the statement of Patrick was that I could not otherwise explain unless I gave the explanation of the status of the man Wilson as given by Mr. Patrick in the course of the transaction.

Counsel for the defendant- moves to strike the statement of the witness from the record as being incompetent and irrelevant and his reasons not called for and not pertinent to any inquiry made of the witness.

127 X Q. Now, then, I will ask you what you mean in this letter when you say you yielded to his request because it was your
279 duty to do so.

A. My recollection in that regard is that I had told Mr. Patrick that if Wilson wanted to put up a portion of the money we would let him have a portion of the mine if he would put his money up.

128 X Q. Put up what money?

A. To the amount, whatever it was; I don't recollect now what.

129 X Q. You stated yesterday that he was to pay a certain sum of money within ten days; you explain now that was a mistake?

A. No; not by any means. On the contrary, I think that was the arrangement—that Wilson was to put up because of Patrick's distrust of him; that he was to put up within ten days, whether ten days from the time of the contract or from the time he should be notified of the assessment I can't fix it in my recollection, but that a certain limit was put on Wilson I am positive in my recollection, and the reasons why—and the letter refreshed my recollection as to that matter—were stated by me yesterday.

130 X Q. Now, will you state what interest you agreed to convey or assign to Mr. Wilson provided he paid his proportion of the expense of the contract?

A. I have not a recollection now; as my recollection is, he didn't pay anything and it didn't impress itself on me, but my best recollection or impression was a third or a fourth of my interest if he did pay.

131 X Q. Was this contract verbal or in writing?

A. I repeat, and I believe this is the fourth time, that I do not recollect whether a memorandum was made in writing of it or not, or whether it was a mere verbal agreement. I have tried to refresh my recollection in that regard, but am unable to do so as nothing came of it and it has passed out of my recollection, and I had even forgotten——

132 X Q. You stated yesterday in your examination-in-chief that you had a distinct recollection that Mr. Wilson never paid
280 anything on this agreement. Do you assert that to-day?

A. I stated yesterday that my recollection was distinct as to that, as I had refreshed it by letters of Patrick, and that the source of my information in that regard was from Patrick.

133 X Q. Was this money to be paid to Mr. Patrick by Mr. Wilson?

A. Certainly.

134 X Q. Was any of it ever to be paid to you?

A. My understanding was not. That is my recollection, but I may be mistaken. That is my best impression.

135 X Q. Now, I ask whether you paid the entire assessment made against one-fourth interest in this property or one-half of this contract down to the 19th of June, 1882, or whether Mr. Wilson paid any portion of it.

A. I settled in full all expenditures contracted by my partner down to June 19th, my recollection is, and then informed him, as he already knew, of my intention that I would be absent for some time, but I have no recollection as to the details of the settlement.

136 X Q. Do you know as a matter within your own knowledge that Wilson or his assigns never paid any portion of the expense of performing that contract down to the 19th of June, 1882, when you had your first settlement with Mr. Patrick?

A. I am sure Mr. Wilson never paid me anything; very sure.

137 X Q. That is not my question.

A. I am very sure and very positive about it, but whether he ever paid Mr. Patrick anything, so far as Mr. Patrick's letters to me are concerned that I have recently examined—well, I don't wish to state the contents of them. Mr. Patrick represented to me that he didn't pay.

138 X Q. I will ask whether at the time of your settlement of the 19th of June, 1882, you paid one-half of all the expenses that had been incurred in the performance of that contract down to that time.

281 A. My recollection —, and this is the extent of my recollection, that I had a settlement and settled up with Mr. Patrick all that he claimed due from me under the contract made with him for the development of the Col. Sellers mine that has been here so frequently spoken of.

139 X Q. That is not my question. I repeat the question. (Question repeated.) Now, the question is whether you know as a matter within your own knowledge that you paid one-half of the expense at that time.

A. I know from recollection that I paid Mr. Patrick all that he claimed fro- me on the 19th of June under that contract, and that is all that I do recollect on the subject, and it is useless for me to try to attempt here to state any more than I do recollect.

140 X Q. Now, I repeat the question again. I will ask you whether you know as a matter of memory whether you paid one-half of the expenses that had been incurred at that time.

A. I can't state from memory any more definitely and positively than I have done that we had a settlement, the contract having been made between Mr. Patrick and I—that we had a settlement and that I paid him.

141 Q. Was a settlement presented to you at that time of the total amount of expenses that had been incurred in the performance of that contract up to that date?

A. My recollection is that a statement was made that so much was due from me and that I paid it.

142 X Q. Do you say he gave you no statement as to the condition of your partnership accounts and the total amount of expenditures up to that time?

A. I say that I entrusted this matter to Mr. Patrick and I do not know whether he really spent the amount of moneys claimed from me or otherwise, but I entrusted that matter to him and took his word for it, and as to the details of the settlement or to whom
282 I paid the money I have not them and I don't think he ever furnished them.

143 X Q. I will now repeat the question again. It seems to be very hard to get a direct answer from you. (Question repeated.)

A. He may have furnished a general statement of so much for timber or machinery, but an itemized statement I don't think I ever had from him at any time, if that is what you want to know.

144 X Q. Who has asked for an itemized statement?

A. I understood it so.

145 X Q. No; that is not what I asked, but I asked to the very contrary. I asked if he stated to you the gross sum expended up to that time—the total indebtedness.

A. As a matter of memory, I can't answer. As a matter of inference, I should say he must have done so, as I know I made a settlement of what was due under that contract. Upon my memory as to whether he made an itemized statement, my impression is that we did not go into items.

146 X Q. Mr. Bowman, I will ask you whether it is your usual or customary way of doing business in such an important matter as this contract was, and as to the performance of this contract, to simply take the statement of your partner and make your payments upon his representations without examining the account or

asking any questions about the amounts due or the state of the accounts.

A. You ask my general custom. My general custom is to trust a man with whom I have dealings until I find he deceives me, and as to this particular matter, having at this time full faith and confidence in Mr. Patrick and having entrusted Mr. Patrick with this whole matter, I took it for granted at that time that he was returning me a true account of all the expenditures—I mean when the account was settled in July—I mean in June, 1882.

147 X Q. I will ask you whether the amount stated to be due
283 at that time was the sum of $1,474.46.

A. I do not remember.

148 X Q. Do you remember whether that is it approximately?

A. I do not remember.

149 X Q. Do you remember anything of what was said?

A. I do not remember.

150 X Q. Do you remember what proportion you paid at that time?

A. I do not remember.

151 Q. Do you remember that you paid anything at that time?

A. I remember that we had a settlement.

152 X Q. You can't state the amount you paid?

A. I remember—I was going to say I had a good many matters and I remember that among others, and that I settled up with Mr. Patrick.

153 X Q. Do you remember that you paid anything at that time?

A. I remember that we had a settlement.

154 X Q. No; answer the question—do you remember that you paid anything?—and we are entitled to an answer to that question.

A. As to having a memory whether I laid upon the table so many dollars, either bills or silver, or drew a check or anything of the kind, I don't remember. I remember that we had a settlement, and that I gave a note, and I remember that there was some moneys due from him, and I remember that there were transactions between Mr. Patrick and I and on account of this written contract entered into for the development of this mine, but what was due or claimed to be due I can't tell you what; and that is the extent of my recollection.

155 X Q. Now I ask whether in that settlement you were called on to pay for any more than the amount of your original interest in that contract, less the amount that was to be due to Wilson's interest.

A. I have no recollection of anything being talked about as to what Mr. Wilson's interest was at this time.

156 X Q. Don't you know as a matter of fact that one-
284 eighth of the cost of sinking the shaft under the performance of that contract was charged to Wilson's interest instead of you in that very settlement?

A. I have already answered I have no recollection of that matter.

157 X Q. Have you a recollection that you paid the entire amount at that time?

A. I will restate my recollection again if you desire it.

158 X Q. Answer the question yes or no.

A. I can answer yes, I have no further recollection than what I have already given you, that there was a contract between Patrick and I——

159 X Q. I know all that. That has been gone over already.

A. And that we made a settlement; we fixed the account and that I gave a note for the balance.

160 X Q. I insist upon an answer to my question.

A. That is as far as my recollection goes. I can't answer the question you have propounded for want of a more specific recollection, but by way of explanation I wish to state that after Mr. Patrick acquired my interest in November or October 19, 1882, in the manner narrated heretofore, that this matter passed out of my mind, and as the title passed out of me I cannot recall, not carry it along for a space of four years in my mind as a running transaction, continuous. I can't recall the particulars of it with that distinctness that I might otherwise recall the transaction.

161 X Q. Now, are you through?

A. I am through.

162 X Q. Your memory yesterday was distinct enough as to the particular date of this settlement being on the 19th of June, 1882. It was also distinct enough as to what entered into your settlement. Now, I ask why it is that you can't remember whether you paid one-half of the expense that was incurred by you and Patrick up to that time, or one-half less the one-eighth?

A. The reason why my memory was distinct as to some
285 matters is, it was distinct as to the notes; it was distinct as to the fact that Mr. Patrick was trying to get moneys advanced, as I thought, before he had expended them; it was distinct as to the fact that I made a settlement with him, and, it was more particularly distinct as I refreshed my recollection from memoranda and date that I had made a settlement at that time, and therefore I have a distinct idea that I made a settlement. Now, I can't recall where I made that settlement with distinctness, and I can't recall whether I made it at my office or at the hotel or where it was. I have been trying to recall it and I cannot even do that.

163 X Q. If you are through I will ask you another question. What memoranda or letters have you by which your memory as to the circumstances of your settlement of the 19th of June is refreshed?

A. There is some memoranda—some of my checks and memoranda of what I was doing, and in looking over my papers I have recently overhauled my papers for other purposes—repacking them, by which my memory was refreshed to the extent that that was the date—about the date of that settlement, and I found various memoranda which refreshed my recollection as to what I was doing and what I did about that date.

164 X Q. Will you produce that memoranda that you refer to as being the ones which refreshed your memory as to the date or the circumstance of the settlement?

A. I haven't them here.

165 X Q. Will you produce them at the adjournment of this examination?

A. I don't know but I will if you wish them.

166 X Q. Yes; we wish them if you have got them.

A. It is not in my power to produce them all, but my memory was refreshed with reference to dates by looking over our books, receipts, and some of our hunting accounts.

167 X Q. I don't care what the memoranda are, but I
286 wish you to produce them.

A. Mr. Hart has those and I can produce them—Oliver A. Hart. I have had a general overhauling of my papers and found in those years what I was doing at those dates.

168 X Q. When was this general overhauling and refreshing of your memory; when did it take place?

A. During the last three weeks since I have been fixing up my affairs and assorting out such papers as I want to retain and burning up others preliminary to a removal of my office.

169 X Q. Has the memoranda which you have referred to been burned up or do you still retain it?

A. Some of the papers of no value relating to other matters I have burned and some I have retained.

170 X Q. I wish you to produce those that you have retained. Now, I will ask whether W. F. Patrick ever made any demand on you for the payment of any assessment, of any portion of the expense of working that mine down to the 19th of June, 1882, when you say you had your settlement.

A. I think I had a prior settlement or talk with him as to the matter in May, about the 8th of May, I think, prior to that time that we had the settlement.

171 X Q. How much did he demand of you at that time?

A. I do not recall.

172 X Q. Did you pay him anything before the 19th of June?

A. Why, he was owing me money that I had expended on his account when we went into the transaction.

173 X Q. That was settled on the 19th of June, wasn't it, the money he owed you?

A. No; I think we had a preliminary settlement about May 8th, prior to the time when your letter that you read here to-day of May 15 was made. I think I was at Denver about May 8th, near that time is my recollection, and that we then had a talk over the expenses of how much he owed me, and we passed accounts
287 of what I owed on account of the Col. Sellers development.

174 X Q. Did that settlement take place in Denver?

A. My recollectin is that it did; that is my best recollection.

175 X Q. You are certain that Mr. Patrick was in Denver about the 8th of May, are you?

A. Now, he may not have been in Denver, but I think he was.

176 X Q. You were not in Leadville, were you, at that time?

A. I don't think I was.

177 X Q. You have stated you were not yesterday.

A. I say I don't think I was. I think he was in Denver, and my recollection would be that he was at the Windsor hotel, in Denver, and I think I went then with Mr. Patrick out to look at his new house that he was building in Denver, at Capitol hill.

178 X Q. Do you care to have the record encumbered with this stuff?

A. I was asked for an explanation.

179 X Q. If I asked where it took place. Now, I call your attention to the contract dated the 28th of August, 1882, executed by you or signed by you, and I will ask whether that is your handwriting. (Paper shown.)

A. That is in my handwriting; that is my signature.

180 X Q. Now, I will call your attention to this statement in that contract — follows: "And in consideration thereof the said Bowman will release and surrender to the said Patrick all his remaining interest in and to the above-described contract so made with said Stebbins and others and to the property described therein." Now, I will ask what you mean in that contract by your remaining interest.

A. The contract explains itself. The reference is there made to the fact of James Patrick having made, as I stated yesterday, a conditional arrangement that he might have a certain interest
288 on the payment of so much money, and you will notice by reading further on that I make a reservation if he purchases that. I make a reservation as to a conditional contract that I made with James Patrick that I spoke of yesterday.

181 X Q. Then this has reference to the interest that would remain in you after deducting the interest that was conditionally assigned to James M. Patrick; does that refer to that?

A. The contract speaks for itself; I can't make it any plainer from any statement of mine than it is.

182 X Q. You may state whether or not you meant by that statement in your contract your interest remaining after the assignment to Wilson and to James M. Patrick.

A. There is nothing of Wilson in that contract, so far as I see now or remember; there is nothing in that reference to Wilson.

183 X Q. Do you intend——

A. I say there is nothing in that in reference to Wilson, and if there is anything in reference to Wilson it certainly has passed out of my mind.

184 X Q. You say that you have no recollection; that you do not recollect whether or not the contract you made with Wilson was in writing?

A. I may have said that, that I didn't recollect about the Wilson matter. It may have been a memoranda in writing, but I do not recollect.

185 X Q. I now hand you a paper dated the 6th of May, 1882, signed by you and Wilson, and will ask whether that was written by you and whether that is your signature. (Paper shown.)

A. A portion of the paper which you have handed to me is written by me and a portion is not. To a portion my signature appears, and the ten days that I recall in recollection is the ten

days that is there spoken of in which he was to make a payment or be forfeited. I had an indistinct recollection of a matter of that kind, but whether that was in writing or not or verbal I do
289 not remember. The memoranda is in matter as I remember it, and on seeing the paper I now recall that it was made at the suggestion of Mr. Patrick.

186 X Q. I have not asked any such question as that. I ask about your signature. I will ask you to state what proportion or what part of this contract is in your handwriting and what is not.

A. The following is in my handwriting:

"This memoranda of agreement, made this 6th day of May, 1882, by and between Frank J. Bowman and William H. Wilson, witnesseth:

"That in consideration of services rendered and as full compensation therefor in the matter of securing a contract with T. C. Stebbins and Lyman Robison and William F. Patrick and Frank J. Bowman, for sinking a shaft on the Col. Sellers and Accident lodes, and securing a patent therefor for a one-half interest in said property, it is now therefore agreed between the parties hereto that said Wilson shall have a one-fourth of said Bowman's interest, that is a one-eighth of said contract, said Wilson paying his proportionate share of all the expenses incurred under said contract, payment to be made within *then* days after receiving from said Patrick notice of the amount due, and failure so to pay shall work a full forfeiture of this contract. Time of payment as above being by agreement the essence of this contract.

"(Signed) FRANK J. BOWMAN.
W. H. WILSON."

And the following words are not in my handwriting written across the face of it——

Q. This contract——

The WITNESS: Let me answer the question that you asked. You asked which was and which was not in my handwriting, "Leadville, Colorado. This contract satisfied by deed from Frank
290 J. Bowman to William F. Patrick of his (Bowman's) right, title, and interest in and to the Col. Sellers and Accident lodes, and by subsequent deed from William F. Patrick to me for 1-16th interest in and to the Col. Sellers and Accident lodes, November 6th, 1882. John Levizey, Jr." This writing in red ink is not in my handwriting. The words "Leadville, Colorado, May 11, 1882. For value received I do hereby transfer all my right, title, and interest in and to the within contract to C. C. Howell, as witness my hand this day and date above written. W. H. Wilson." And written across the face of it: "Cancelled by consent. W. H. Wilson." The whole of which has erasure lines drawn across it isn't in my handwriting, as also in a different ink the words "Leadville, Colorado, May 11, 1882. For value received I do hereby transfer all my right, title, and interest in and to the within contract to John Levizey, Jr. as witness my hand this day and date above written.

William H. Wilson." This is in blue ink of a different description. "W. F. Patrick." This is not in my handwriting.

187 X Q. Then I understand you to say that part of this paper you first read, written in black ink, to which is attached your signature, is in your handwriting?

A. That is in my handwriting, and that embodies——

188 X Q. Just answer my question?

A. Very well.

189 X Q. And the signature to it, "Frank J. Bowman," is your signature?

A. Is my signature.

190 X Q. And W. H. Wilson was signed by him?

A. I don't know his signature, nor do I remember.

191 X Q. And signed in your presence?

A. I don't remember. I don't remember the fact of making it. Now you produce it I do remember that Mr. Patrick wished that I would have that Wilson business put where we could serve proper notice of forfeiture, and that does refresh me as to that matter. I was not versed in the time contract law of Colorado of making the time the essence, and Mr. Patrick explained that matter to me, as he had had a good deal of experience in it.

291

192 X Q. Explain what matter you refer to.

A. Of making time the essence of a mining contract so as to forfeit a party out. Mr. Patrick explained that process to me and explained that Mr. Wilson was no good, and he wanted it to be put in good shape to forfeit him out. Now, that is as I think the matter was, only the memorandum was made in writing; I didn't recall that fact.

193 X Q. Then the consideration for this contract was as a full compensation for services rendered by Wilson to you in securing the contract with Stebbins and Robison for yourself and Patrick, was it?

A. I didn't understand any such service had been rendered by Wilson; I didn't consider him entitled to make any such claim. As explained to me at the time by Mr. Patrick, Wilson would claim anything, and, to use the expression which I think is used there, "to shut the fellow up," he was given the privilege of putting up some money and coming in if he wanted to, and by the terms of the contract that he made himself he was to pay in full for anything he acquired, and the reason was because he didn't recognize that he owed him anything.

194 X Q. This was to be a payment in full?

A. This was to be a payment in full. He was not to get anything for services rendered. We denied that we owed him anything. We said if anybody owed him it was Stebbins and the other parties. As I explained to you, he admitted once that he sued them and claimed his compensation from them.

195 X Q. Then it was agreed on his part that he was to pay his proportionate share that was incurred under that contract in consideration of the assignment to him?

A. And put his money up within 10 days.

292 196 X Q. Now, did you know within five days after this contract was assigned that he assigned it to John Levizey, Jr., and that Levizey has borne the proportionate share of developing that property down to the time you parted with your interest as represented by his proportionate interest in the contract?

A. I have no knowledge of any such state of facts as you state. I have information from Mr. Patrick to the contrary.

197 X Q. What information have you?

A. To the effect that Mr. Wilson didn't pay anything and forfeited the contract.

198 X Q. How did you get that information?

A. I got it from Mr. William F. Patrick by word and letter both.

199 X Q. Have you any such letter in your possession?

A. Not at this time. I have had such letters in my possession and I think that I shall be able to produce the letters. I am having the trunk in which my letters that I received when North, when I came out of the woods, thoroughly searched, and, as I explained to you, if you had postponed this examination a little longer I presume I could have produced quite a number of letters. I expect to be able to.

200 X Q. Are you willing to do so to-morrow morning?

A. I do not know that I shall be able to to-morrow morning.

201 X Q. Do you say that you have seen this particular letter recently in which you are advised by Mr. Patrick that Wilson forfeited his interest in that contract? Do you say that you have had your memory refreshed recently by inspecting a letter of that kind?

A. I did not say that I had refreshed my memory recently by inspecting any particular letter. I said that I had refreshed my memory by looking over a number of letters.

202 X Q. Did you not look over letters and refresh your memory to the effect that Mr. Patrick had notified you that Wilson had forfeited his interest in that contract?

293 A. I saw a letter to that effect since I have been overhauling my papers, which I presume I could produce, but I can't do it now.

203 X Q. Will you produce it by to-morrow morning?

A. If I get it by that time I will.

204 X Q. Is there anything to prevent you from getting it by to-morrow morning?

A. I do not know whether I can get it to-morrow morning or not.

205 X Q. When did you last see the letter that you have just referred to?

A. Since this suit was commenced; I do not recollect the date.

206 X Q. Where did you see it?

A. I saw it in possession of Judge Laughlin.

207 X Q. Who is Judge Laughlin?

A. He is an attorney for my former wife.

208 X Q. When was this you say—since the commencement of the suit?

A. Yes. I will state briefly I am negotiating through Judge

Laughlin to obtain possession of a large number of my papers which have not been in my possession since June last.

209 X Q. When did you see this letter you have just referred to as being in the hands of Judge Laughlin?

A. I saw it in his actual hands.

210 X Q. At what place in this city?

A. In the city of St. Louis.

211 X Q. In his office?

A. No; I believe over at the Southern hotel. I do not know but I saw the bundle in his office.

212 X Q. Have you applied to him for the production of that letter since that time?

A. I repeat again, I expect to have control of all my letters and expect to be able to produce them all, but at present it is not in my power to produce one of them.

213 X Q. Now, please answer my question, have you applied to him for this particular one?

294 A. I have arranged with him to produce this letter and all my letters, and shall have possession of all of them, I expect, before the hearing of this suit.

214 X Q. Has Judge Laughlin or have you possession of the letter you have referred to now?

A. I have not now possession of any of the letters I have referred to, but I expect to obtain possession of them through Judge Laughlin and I will now say that I expect to receive from the hands of Judge Laughlin physically each one of those letters.

215 X Q. Has Judge Laughlin, to the best of your knowledge, possession of those letters at this time?

A. At this time I can't say where the letters are; I can say I saw them in Judge Laughlin's possession and went over some of them with him, and this letter particularly I went over with Judge Laughlin.

216 X Q. Did Judge Laughlin hand the letter to you for the purpose of enabling you to read it?

A. Judge Laughlin himself had the bundle of letters and I called his attention to this letter as the one I wanted; I wanted that and some other.

217 X Q. Did you ask him to deliver them to you at that time?

A. I made no such request at that time; he left my room with the bundle of papers, and I arranged and he promised me that I should have all my papers that my former wife had possession of and I expect to receive this letter from his hands.

218 X Q. Was this particular letter——

A. This particular letter we are talking about was in the particular bundle that was in Judge Laughlin's hands at the time I have referred to.

219 X Q. Now I ask you whether you ever served any notice of forfeiture on Mr. Wilson after receiving such information from Mr. Patrick.

A. My information from Mr. Patrick is that he duly forfeited Mr. Wilson's interest.

220 X Q. Is that the statement of this letter that you have referred to?

A. I can't give the language of the letter.

221 X Q. I don't ask for that, but I asked was such a
295 statement in the letter.

A. That is in substance what it amounts to, as I recollect it, and I have seen it so recently I presume that it is in substance—that it amounts to that; but I cannot give the language.

222 X Q. If there was any notice of forfeiture served upon Mr. Wilson because of the non-payment of his portion of the expenses, can you state whether it was forfeited through any act of yours?

A. To the best of my recollection——

Mr. McGINNISS: I object to the witness being asked to explain the legal meaning of the contract.

223 X Q. I wish to know whether any notice was served by any act of yours.

A. Mr. Patrick, as my partner acting for me, I have an impression he served a written notice, but I am not positive in my recollection about it. I would not say. I can only say I remember this swimming arrangement with Wilson, and, as Patrick expressed it, "to be shut of him," I think to be rid of him I put it down in that form in that paper at Patrick's instance so as to be done with him, but whether there was a written notice drawn up I do not recall. I can't remember at this time, but I am satisfied I was informed of that matter by Mr. Patrick as to how it should be done.

224 X Q. Was your arrangement with Wilson or did your partnership with Patrick have anything to do with the arrangement you had with Wilson?

A. Why, Mr. Wilson's claim, if he had any, was certainly against Mr. Patrick as much as against myself, for we were both equally interested, and as I attempted to explain to you the meaning of my letter in which I said it was my duty to do it, I had said that if it became positively necessary and Wilson put up any money, Patrick wishing to keep the whole of his, that I would let Wilson in to a certain amount.

225 X Q. But there was no partnership arrangement be-
296 tween you and Patrick by which you were to transfer out of your interest or assign any portion of your interest to Wilson, was there?

A. I don't know as I understand your question. I wish to do so before answering it.

226 X Q. This assignment by you to Wilson, as evidenced by the paper exhibited to you, was your individual matter and not a partnership matter, was it not?

A. The portion of it which refers to his claim for a service in obtaining that contract was certainly a partnership matter, for if there was any consideration for that agreement it was a consideration to the partnership, as much to Mr. Patrick as to myself, for we bought jointly together. The whole transaction was together, and if Mr. Wilson rendered any service that was for Mr. Patrick and myself,

in connection with that matter; but I denied and Mr. Patrick denied that we were either of us under any obligation to him; but I finally consented that if Mr. Wilson would put up his money that he might have an interest. I had forgotten how much until you produced the memoranda, but that corresponds with my recollection as to the amount, and it was particularly provided, on account of the character that Mr. Patrick gave of Mr. Wilson, that he should have a forfeiture clause in it. I saw that it was put down in a memoranda, as well as being verbal, but the memoranda agreement of that date is, I think, the simple writing out of the verbal agreement of a date considerably previous to that, and it was written out for the purpose of having it put in ship-shape, that Mr. Patrick might bring Mr. Wilson to an end.

227 X Q. Are you through?

A. I believe I have tried to explain the matter.

At this point the examination was adjourned until half past ten o'clock to-morrow morning, May 12th, 1887.

297 ST. LOUIS, THURSDAY, *May* 12, 1887.

Parties met pursuant to adjournment.

Present as at the last hearing.

The cross-examination of FRANK J. BOWMAN was continued as follows:

228 X Q. You stated in your examination yesterday that you had received a letter from William F. Patrick in which he stated to you that the Wilson interest had been forfeited by Wilson for non-payment of his share of the expenses of developing the Col. Sellers mine. Can you now produce that letter?

A. When you propounded this question to me I did not have it in my power to produce the letter. Since then my attorney has been down and obtained from Judge Laughlin the letter to which I refer, which I here produce, being the latter of May 21, 1882, signed by William F. Patrick and addressed to me from Leadville.

229 X Q. When did you see that letter last before to-day?

A. Several days ago; I do not remember what day it was.

230 X Q. Where?

A. I saw it on a table in my room at the Southern hotel, room 328.

231 X Q. In the hands of Judge Laughlin?

A. Judge Laughlin was there at the time and rolled this and other papers up together. He has been engaged in procuring for me the papers to which I believe myself entitled.

232 X Q. Is this the only letter that you have received from William F. Patrick relating to the forfeiture of the Wilson interest?

A. I can't say that it is.

233 X Q. Have you any other letter referring to that subject?

A. I have no other letters in my possession or in my power to produce except the letter I hand you.

234 X Q. Do you know of any other letter referring to
298 this subject of forfeiture of the Wilson interest?

A. I think probably the matter is mentioned in other letters.

235 X Q. Have you any positive knowledge on that subject?

A. I might give you my best impression.

236 X Q. Is that your best impression?

A. I have stated my knowledge on that subject.

237 X Q. Have you any information from William F. Patrick that notice of forfeiture was served upon Wilson?

A. I have a recollection which is faint as to his statement, and my other information would be in the form of letters or documents.

238 X Q. Where are they?

A. I do not know where they are at this time; they are not in my possession; I explained to you yesterday the reasons why I could not produce them, and also that I expected to be able to make such arrangements as to be able to be put in possession of them and produce them.

239 X Q. In this letter you have produced, and which we ask the commissioner to mark Exhibit A, offered by the defendant, is contained the following: "In regard to my draft on you, I told you that I had no idea Wilson would pay, and that I would draw on you for a further amount of $465 and in case Wilson did pay that I would return it to you. That was our agreement and yet in spite of that you telegraph 'rebates not satisfactory.'" What is meant by the expression "rebates not satisfactory"?

A. I have not in mind the particulars now and cannot from recollection state; there were matters in which I had expended moneys for him and on his account, which, in our settlement or talk of May 6 to 8, about that time, were to be credited to me; it may have referred to them; I have not a distinct recollection as to what it did refer to.

240 X Q. Doesn't the fact that the expression "rebates not satisfactory" is mentioned in connection with the Wilson matter refresh your memory so as to enable you to state definitely what
299 it means?

Plaintiff's counsel objected to the question because it assumes that it refers to the Wilson matter when the letter shows it does not.

A. I answer as before, I think, although I can't speak positively, that it referred to matters of our accounts. They were matters of expenses which I had paid out, for which he was charged and of which I was to receive credit. We had some talk in our settlement how the matters stood, and, I think, it must have referred to that.

241 X Q. When you speak of "our accounts" to what accounts do you refer?

A. I had paid out moneys for Mr. Patrick—he being short of money, or professing to be—in matters connected with his own business, in which I was not concerned other than as an attorney for

him. When we entered into this agreement as to these mines the amount which he owed me was included in my payment, as I now recollect.

242 X Q. Was that a matter in which Wilson had anything to do or any relation to?

A. Not so far as I recall.

243 X Q. Then when you refer——

A. I can't speak positively, but I don't remember.

244 X Q. Then when you speak of this expression, "rebates not satisfactory," your best recollection is that it has reference entirely to a private transaction between you and Mr. Patrick and with which Mr. Wilson had no connection?

A. I stated that was the best of my recollection; but Wilson may have been concerned in Patrick's other matters—his individual matters; I can't say.

245 X Q. Then can you explain why he says that your telegram, in answer to a draft that was drawn on you, and in which he says, "I had no idea Wilson would pay, and that I would draw on you for the full amount of $465; and in case Wilson did pay
300 I would return it to you," and then says, "That was our agreement, and yet in spite of that you telegraph 'rebates not satisfactory.'" Now, would you say, after hearing this portion of the letter read, the words "rebates not satisfactory" had no relation to any matter Wilson was connected with?

A. I will repeat again the matter of "rebates not satisfactory" to the best of my recollection had nothing to do with Wilson's business. As to Wilson's business, my recollection is that he was to make a demand from Wilson; the paper produced yesterday was arranged so that he might do so, and I think he got Wilson to sign it, to the best of my recollection, and in the arrangement he was to show that Wilson's claim or pretense of a claim—which I never admitted was genuine but bogus on his part to any claim or compensation—should be completely wiped out, and he was to attend to and do that; then in addition to that the payments were made, as I have said, by my paying balances after being allowed what I had paid out. These matters that I had paid out I had allowed to me as rebates on my charges, and it is to this, my recollection is, this telegram referred, and not to the Wilson matter.

246 X Q. Well, I will ask you whether Mr. Patrick drew on you as stated in this letter for the sum of $465, as your proportion of the expense of working the mine at that time.

A. I have no recollection on the subject. Very likely he did, but I do not remember it.

247 X Q. Did you pay that draft?

A. I do not recollect. I know the matter was settled afterwards, if not then.

248 X Q. Was the draft itself, or does this letter indicate to you that it was not paid?

A. It indicates to me the fact that he drew on me for a larger sum than I believed he was entitled to under the settlement of our

accounts in the talk we had concerning them about May 6th to 8th, and that I agreed that he might telegraph me to order a
301 rebate corresponding with our accounting so that I could pay his draft.

249 X Q. That is, rebates made on account of moneys you had expended on his behalf for services?

A. That is my present recollection. I may be in error, but I give you my best recollection as to the matter.

250 X Q. I exhibit to you a telegram dated St. Louis, Missouri, — 15, 1882, and directed to William F. Patrick, which read as follows: "Must know Wilson's conclusion; rebates not satisfactory; at once. Frank J. Bowman," and ask you whether that enables you to state.

A. This enables me to recall with more distinctness that the rebates did not relate to the Wilson matter. There were two things which I desired, which he promised me that he would have positively determined at that interview, when it was arranged that Wilson should sign the paper, and that was that he would have Wilson's interest duly forfeited and out and proof of it furnished, and he had drawn before forwarding the information definite, and I had not then received definite information which I was to receive before he drew that Wilson was out. I afterwards did receive it and hence the first part of the telegram complaining of one thing, viz., that he has not let me know Wilson's conclusion——

251 X Q. What conclusion?

A. That he would not put up any money; and, secondly, that he had not given me a proper rebate on our accounts. He afterwards furnished me that information that Wilson was out, as called for in the first clause of the telegram, and the matter of rebates of our accounts was afterwards settled in our settlement of June 19.

252 X Q. How did he furnish you information afterwards that Wilson was out?

A. The letter of May 21, which was written probably in response to a letter I may have written after sending the telegram—I do not recollect that I sent any, but very likely I would—and then
302 he furnished me information in that letter that Wilson was out; I so understand the letter.

253 X Q. Is this telegram the telegram that is referred to in that letter?

A. My presumption, but it is not a recollection, is that I would write him as well as telegraph him, and my recollection is that there was some telegraphing done, and that we tried to have the matter fixed up so I could pay a draft; that I didn't wish to have a draft go and not pay, and that I tried to fix it up by telegraph, but whether I did so by telegraph or wrote myself I have not a distinct recollection.

254 X Q. Now, do you say that this telegram was the telegram referred to in that letter? I ask if this telegram is the one referred to in this letter in which he says "rebates not satisfactory."

A. I have no means of knowing what Mr. Patrick referred to further than would be indicated by his language here. What he

meant from his own language here I do not know. His language would indicate that to you as much as to myself.

255 X Q. From your knowledge of the transaction and having your recollection refreshed by letter and telegram, are you not able to say whether that telegram was the one mentioned in this letter?

A. I have already answered that I didn't know what Mr. Patrick meant further than what his words indicate.

256 X Q. I am not asking you what Mr. Patrick meant, but what your knowledge of that transaction or from your knowledge of that transaction if you are able to state whether this is the telegram sent by you to Mr. Patrick on the 15th of May, 1882.

A. I have no doubt I sent a telegram of the description which is here produced.

(Telegram referred to is offered in evidence and marked Exhibit B.)

257 X Q. In the letter which you produced, marked Exhibit A, is contained this statement: "I answered your telegram just as
303 soon as it was delivered to me." Have you in your possession or can you produce the telegram from Mr. Patrick which he refers to in this letter?

A. I cannot at this time produce any of his telegrams or letters. There are a number of telegrams and letters, I think, in Judge Laughlin's hands. Whether he has that or not I do not know.

258 X Q. Do you know where this telegram that Mr. Patrick refers to in this letter is?

A. I do not.

259 X Q. Have you any letter received from Mr. Patrick purporting to be an answer to your telegram above referred to?

A. I have already answered that I have not at this time in my possession or in my power now to produce any letters or telegrams of Mr. Patrick's, but hope to be able to do so, and I have explained to you my reasons.

260 X Q. Now, I ask whether in the last three or four weeks you have not had in your possession a package containing nine letters from Mr. Patrick or from the Patricks relating to matters connected with this suit.

A. I was temporarily entrusted with a package of letters and telegrams some time ago for the purpose of looking at them, which I have given back to Mr. Laughlin, and I am negotiating for their delivery to me with my former wife.

261 X Q. How long did you have them in your possession?

A. I do not recollect the exact time.

261 X Q. Did you have them a day?

A. Oh, no; they were not in my possession a full day.

262 X Q. Did you have them over night?

A. I was trying to think whether they remained in my room over night. I think decidedly that they remained over night in my room.

263 X Q. Did you exhibit them to any person?

A. I stated to Col. Wolcott that they had been found.

264 X Q. Did you exhibit them to him?

304 A. No further than to say that if he doubted Patrick had written letters that there were the letters that had his signature. I did not exhibit the letters to him.

265 X Q. Did that package contain nine letters or did you state that it did?

A. I stated it contained several, but I do not remember how many.

266 X Q. Did you have them in your exclusive possession over night?

A. Only—if you wish me to state the circumstances I will do so to cut the matter short. My papers were left at my former residence in the custody of my wife—my former wife—at the time I instituted suit for divorce. I have desired to secure the custody of these papers, and particularly all that were written by Mr. Patrick. I have seen Judge Laughlin, who was the attorney for me wife, and made propositions to him to secure those and other papers for me. Conditions have been imposed that I should do certain things in the nature of a business transaction before I could become entitled to them, and I have been requested and urged by Judge Laughlin to comply with those requests, and for the purpose that I might see that the letters and papers would be of some value to me and to urge me to concede to the terms of delivery of them they have been shown to me, but they are not now, one of them, in my possession, nor can I secure them without a compliance with the terms which involve the possession of certain securities.

267 X Q. How is that?

A. Which involves the discharge on my part of certain securities concerning which there is some question. It is well known that the papers are now in Judge Laughlin's hands and will remain there until I perform the terms on which I am to receive them. That answer is thus full to save any other explanation.

(Last question repeated.)

A. I think I had a portion of them.

305 (Last question repeated.)

Plaintiff's counsel objected to the question as totally irrelevant, whether they were or not.

268 X Q. Did you have exclusive control and possession of those letters over night?

A. I do not know what significance you attach to the word "exclusive." I had the letters or a portion of them—I do not think all of them—in my possession temporarily with the understanding that I would return them for the purpose of making an examination of them. My best recollection is that I had them at the Southern hotel and that I was permitted to examine them and done so, probably taking them down there with me about 6 o'clock in the evening and taking them up to my room and looking over them. Judge Laughlin came to my room and we looked them over on a table to see whether they were of any value to me and to see whether I would make a concession to get the right to them. During that

time I had them, but I had no right to keep them and was under an obligation of honor to return them to Judge Laughlin. I had them to see whether they were of any value to me and whether I would be willing to make any concession to her to surrender them, and I surrendered them back to Judge Laughlin.

269 X Q. Was Judge Laughlin present during all the time you had possession of those letters?

A. I stated, "No."

270 X Q. Did you examine the letters you had in your possession carefully?

A. I did not.

271 X Q. Can you state the dates of them?

A. I cannot.

272 X Q. Can you give any dates?

A. I can't at this moment recall any dates, but my memory might be refreshed upon that.

273 X Q. Can you state positively what dates the letters were written?

A. Between January, 1882, and October of the same year.

306 274 X Q. Were letters written during the months of July or August, 1882?

A. I can't say positively.

275 X Q. Or of September?

A. I can't answer positively as to the months. I glanced at them and looked at them to see that they were the letters referring to this transaction and would therefore probably be of some value to me, and it was with that purpose that I was looking through them. I don't think I read the full contents of a single letter.

276 X Q. Can you state how late in October he had written to you—the date of the last one?

A. I can't say.

277 X Q. Can you give any date in October?

A. I have already stated I could not give the date.

278 X Q. Do you know of any other letters than those you have named in possession of any other party or persons?

A. I do not know where a single letter of Mr. Patrick's now is except what I have now indicated.

279 X Q. Have you known at any time since the commencement of this suit?

A. I have seen letters from Mr. Patrick since the commencement of this suit.

280 X Q. Where have you seen letters from Mr. Patrick since the commencement of this suit other than those which you have introduced in evidence here?

A. I have seen them in this office.

281 X Q. Letters different from those in possession of Judge Laughlin of which you have already testified?

A. I have.

282 X Q. In whose possession were they?

A. In Mr. McGinniss' possession.

283 X Q. Has Mr. McGinniss possession of them now?

A. I do not know.

284 X Q. How long ago did you see them in his possession?

A. I do not think I have seen any in his possession from William F. Patrick for some time; I do not recollect how long—the
307 time when I saw some from Mr. William F. Patrick.

285 X Q. Do you know whether Mr. McGinniss, as your attorney, can produce those letters now?

A. I do not know. They did not come from me to Mr. McGinniss.

286 X Q. Do you consent that your attorney may produce the letters that are in his possession at this time from William F. Patrick?

A. I am not conducting the case, but am simply testifying as a witness at this time, and as such I prefer to act for the present.

287 X Q. Do those letters belong to you?

A. No, sir; the letters to which you refer do not.

288 X Q. To whom do they belong?

A. I do not know to whom they rightfully belong.

289 X Q. To whom are they addressed?

A. I am not positive in my recollection, but I think to his brother and other parties—to his brother James and other parties.

290 X Q. What other parties; do you know?

A. I cannot state positively whether to his brother James. I feel positive in my recollection that there are letters, some of them addressed to his brother James, and my best impression is some to other parties also.

291 X Q. You have already stated that some were addressed to James, but the other parties I am inquiring about now.

A. My recollection is not distinct as to the other parties.

292 X Q. What is your best impression?

A. My best impression is to James' wife or to McManus or to his wife Annie, or to Mr. Wolcott. I have not a distinct recollection as to whom they are addressed. I did not particularly notice as to that.

293 X Q. You say it is to either one of these parties?

A. I would not be positive it is to either one, or I would not be positive in my recollection that there are any that are not
308 addressed to his brother James. I do not remember, but I am quite positive in my recollection that some of them are to his brother James.

294 X Q. Can you state from your knowledge of your relations with William F. Patrick and the transactions referred to in this letter of May 21, 1882, what is meant by this statement: "By looking in your note book you will see the two amounts"?

A. Please indicate what you wish to know.

295 X Q. I will repeat the question. My question is whether you know what is meant, "By looking in your note book you will see the two amounts of $280.69 and $465, and you said you would instruct the Boatman's to pay either amount. Now, my question is, Do you know what is referred to in that letter concerning your note book and those two different amounts?

A. I fail to apprehend your question. If you wish to know it, I have a note book—I will say I think I did. If you wish to inquire whether any figures or amounts have been put down, I will say my recollection is we had a settlement or talked over about the amounts due each from the other about May 6 to 8, and it is likely that Mr. Patrick is intending to state his recollection of what then occurred.

296 X Q. Do you recollect that you agreed with Mr. Patrick to honor his draft at this time for either the amount of $280.69 or $465?

A. I have no recollection as to the amounts. My recollection is only to the extent that we made a settlement or had a talk over our affairs at the time last indicated.

297 X Q. Did you instruct the Boatman's Bank of St. Louis to honor or to pay Mr. Patrick's draft for either the sum of $280.69 or $465 during the month of May, 1882?

A. I have no recollection as to the amounts you mention. I have stated the extent of my recollection of the matter: that when
309 the moneys were wanted he should draw, allowing certain credits, and my recollection is that he drew for a larger amount than I thought he was entitled to, and that we had some telegraphic correspondence; at least I telegraphed him to make proper rebates so that I could have the draft paid.

298 X Q. Now, can you state definitely what the matter was upon which you claimed a rebate at this time, and which is referred to in your telegram of May 15, 1882?

A. I cannot state the terms of the transaction. Moneys had been paid by me for Mr. Patrick and services had been rendered, and we talked the matter over, and I supposed had come to an understanding as to how much I should be allowed on different items. It seems there was some—at that time he drew on me—misunderstanding as to the amount.

299 X Q. Then had there been no agreement between you at the time the draft was drawn that is referred to in the letter of May 21 as to the amount that you were entitled to as a credit for moneys expended and services rendered to William F. Patrick in other matters, and which he was to give you credit for on the Col. Sellers account?

A. I have not so stated.

300 X Q. Then I will ask you again what is meant by the statement in your telegram of May 15 that "rebates not satisfactory." You may state in what manner it was not satisfactory.

A. That he had not allowed as much by way of rebates as I claimed I was entitled to.

301 X Q. Now, then, what is meant by rebates?

A. Deductions from the amount claimed.

302 X Q. What deductions and from what amount?

A. I do not remember the particulars of the account at this time nor can't state as to details.

303 X Q. Can you state what amounts you referred to?

A. I do not remember whether the rebate was 100, more or
310 less, or $200, or what particular amount of rebate I claimed.

304 X Q. Can you state what the rebate was?

A. No further than I have already indicated.

305 X Q. Do you mean by that that you are entitled to certain credits to be deducted from the amount stated (as due to you) as your proportion of the expense of working the Col. Sellers mine?

A. I mean that, to the best of my recollection, he had drawn on me for a larger amount than he was entitled to under the condition of the accounts between him and myself, as talked over by us about May 6 to 8.

306 X Q. You speak in the letters of your account. What account do you refer to?

A. I have stated and restated that I had performed services for Mr. Patrick and paid out moneys for him; that we had a settlement or a partial settlement first about the time of this agreement or the day following, when this agreement was made with Stebbins. At Leadville, on February 17th, we had another settlement or talked over our accounts. In the early part of May, as I recollect, from the 6th to the 8th, we had another settlement; our last one, June 19.

307 X Q. Are you through?

A. Yes.

308 X Q. Now, then, do I understand you that what you meant by "rebates" is that for the moneys you had expended and the services performed for William F. Patrick in other matters you were to deduct the amount due to you for such services and expenses from the amount that was to be due from you in the working of the Col. Sellers mine under that contract?

A. That is my best recollection.

309 X Q. Well, that might have been answered in a short answer—simply whether one can be set off against the other.

A. I have tried to make it plain all the time and thought I had answered it from the beginning.

311 310 X Q. I will now call your attention to a settlement of June 19, 1882, of which you testified in your examination-in-chief, and will ask you where that settlement was made.

A. I have already stated and repeat that my recollection is not distinct as to the place where it was made.

311 X Q. You stated your best recollection as it was made in St. Louis, did you not?

A. That is my best impression, and yet my recollection was not so distinct that I can state positively.

312 X Q. Can you state at what place in St. Louis it was made?

A. I have already stated in answer to a previous question that I hadn't it in mind where.

313 X Q. Now, can you state what amount was demanded of you by William F. Patrick as your proportion of the expense of working the Col. Sellers mine or developing it at that settlement on the 19th of June, 1882?

A. My recollection is no more distinct to-day than when you propounded a similar question yesterday.

314 X Q. Have you any means of ascertaining that fact?

A. I have no means by which I could fix the amount at this time, but I may be able to secure papers by which I could fix it, but cannot now fix it.

315 X Q. Have you any knowledge of any papers, books, memoranda, or bank book that will enable you to state the amount that was demanded of you at that time and the amount that you conceded was due from you in that settlement?

A. I know that I have a large trunk of papers concerning my transactions about that time, and that among them it is likely I may be able to find some papers, if they have not been destroyed, that would fix or help to fix the amount, but at the present I cannot fix it.

316 X Q. Now, can you state what proportion of the total expenditures that had been made in the performance of the
312 contract of the 17th of February, 1882, you settled for on the 19th of June, 1882?

A. I cannot state it to-day any more definitely than I stated it yesterday, and that is a general recollection that I settled for all that Mr. Patrick demanded on account of the contract he and I had entered into with Mr. Stebbins and associates.

317 X Q. Can you state the amount that was paid by you at that settlement or settled by you? Can you state how you paid it or the amount that was settled for?

A. As I stated yesterday, I remember giving a note, but as to the amount of the demand I have no such recollection as to enable me to state.

318 X Q. I will ask you whether the amount of the note that you gave at that time was $288.70.

A. As a matter of recollection I cannot answer that question.

319 X Q. Can you state whether that is it approximately?

A. As a matter of recollection I cannot possibly answer. I was at that time paying out in different matters—engaged in different matters, mining matters and others—a good deal of money for different things, and as to the amount of the payment I then made, without reference to the papers made at the time I could not and would not undertake to state.

320 X Q. Do you say you have no idea of the amount of that note given by you to Mr. William F. Patrick on the 19th of June, 1882?

A. As a matter of remembrance, to testify as a witness in reference to it, I have no such recollection as that I could state it.

(By Mr. McGinniss:)

321 X Q. Give your best impression and make the best guess you can at it.

A. I will say that my impression would be that the note in amount was about what you state, but that is not a matter of recollection so

distinct that I can recall it. I wish to state here I have no
313 doubt in my own mind that you state the amount in your question correctly, but as to stating as a matter of my remembrance that you do state it correctly I cannot do it.

322 X Q. Now, then, I ask in addition to that, supposing that to be the true sum, if Mr. Patrick did not give you credit for the sum of $264.23 for expenses paid and services rendered by you for him as his attorney in other matters.

A. I can only answer that I have a recollection that such matters of account as existed between us unsettled were settled at that date, and now that I have been talking it over, I have a recollection of James Patrick coming to the office (and I would not be certain at this length of time whether that settlement was made with James Patrick) coming with a letter from his brother, and whether it was made with his brother in person as some of these transactions were had with Jim Patrick here and some with Will. I would not be clear in my recollection as to which party made the settlement.

323 X Q. I will ask you whatever amount was due from William F. Patrick to you for legal services or moneys expended in his behalf, whether this amount or any other amount was not settled in this settlement of June 19.

A. As I have stated, my recollection is that a full settlement was made as between William F. Patrick and myself on the 19th of June of all matters to date, as I understood it, of all expenses in our joint partnership venture concerning these mines, as also our individual account; that is the best of my recollection, but the terms of it I have not in my mind.

324 X Q. And then if you had a full final settlement with William F. Patrick on the 19th of June, 1882 of all claims that you had against him at this time, the note that was given by you payable in
90 days for $288.70, or whatever the amount was, was the
314 balance due from you to him on account of the Col. Sellers, wasn't it?

A. I can't say yes to that, as the best of my recollection would be that that was to include what would be due on some contract or bill that was to be paid and would be due before I would return from my fishing trip, but that would be the best of my recollection, and, as I stated, my best recollection is I have a note instead of money, because of the fact that I thought Mr. Patrick was drawing moneys on me before they were due or expended. That is my best recollection on that subject, that it was for money due or that would become due before I would return.

325 X Q. Was it not because, as you stated at that time, that you didn't have the money at the time to pay the amount of $280.70, and that you therefore gave a note for 90 days instead?

A. I say I do not think it would be for the cause you mention, as I see by my bank account I had a very considerable amount of money in bank; several times the amount of this settlement.

326 X Q. Didn't you state to Mr. Patrick at that time that you did not have the money, and did not he say to you that he must

have the money, and wasn't it at your suggestion that he would take your note and have it discounted?

A. I have no recollection of any such conversation. I remember Mr. Patrick complained of being short of money continuously, and that was the reason of my advancing money to pay expenses for him in his own matters, but I do not recall any such conversation as you narrate.

326 X Q. In this settlement of June 19, 1882, wasn't there taken into account the fact that Levizey, the assignee of the Wilson interest, had paid $184.30?

A. I have no recollection of hearing Levizey's name until this suit commenced, as a matter of memory, but I may have done so.

I do not recollect it, and, in explanation of that statement, I
315 will say that I relied at the time so fully on Mr. Patrick that I did not go into the matter of the items of his account or how it was made up as to expenses connected with the mine. I simply furnished him what I had paid out for him and what was due to him and relied on his general statement of what was due from me on account of that mine, and how he made up the items I doubt if I remember now.

327 X Q. To refresh your memory I will offer a letter of William F. Patrick's of the 21st of May, 1882, in which he speaks of the amount that you authorized him to draw for as being $280.69 or $465, the difference between the two amounts being $184.30, the exact amount that Levizey had paid at this time, and ask if that does not enable you to recollect that Levizey's payment was taken into account on the 19th of June, 1882.

A. I have not stated, what your question would imply, that Levizey had paid any sum, but, on the contrary, my settlement was as I have stated, and I have no recollection of hearing Levizey's name mentioned, and consequently I can't answer the question in that form in which you put it.

328 X Q. I will ask you if you remember in the settlement the gross sum was nearly $1,500.

A. I repeat my answer that I have not a recollection of the amount.

329 X Q. Have you any means of ascertaining that amount?

A. Not at the present time.

330 X Q. Well, will you have at any future time?

A. That depends on the negotiations now pending. I hope so.

331 X Q. Did you take any copy of this account as settled between you and Patrick at that time?

A. I cannot say from recollection.

332 X Q. Did you look over his figures and over your own accounts for the purpose of settling the question of rebates and finally arrive at the amount as to how to settle it satisfac-
316 torily to you?

A. I do not think I looked over the items of his account. It was not my way of doing business with him. I made out the whole account of what I had expended for him and what was due, and I took his statement as to what I owed him. I would not have

done business that way if I had not had confidence in the man at that time that whatever aggregate he reported to me would be correct.

333 X Q. You can't state the aggregate, can you?

A. I cannot. I had been his attorney. He represented me there and on account of the intimacy I did not examine about the details of his account as I would perhaps under other circumstances. I do not know how he arrived at the amount that he claimed to be due fro- me. If I ever did know I do not now recall.

334 X Q. Now, Mr. Bowman, you have stated in your examination-in-chief that you had some sort of an understanding with J. M. Patrick by which he was to have a portion of your interest in the contract that you and William F. Patrick made with the owners of the Col. Sellers mine. Now, will you state what that understanding was and in what manner he was to acquire his interest and on what conditions?

A. On the payment of money.

335 X Q. Well, how and in what manner?

A. I do not recall the details. I have a recollection of saying something to Mr. James M. Patrick to the effect that if he would pay a proportionate interest what I would let him have an interest in the matter. This was at the time when as I was informed by William F. Patrick that Wilson would fail or had failed to put up any money, and, relying on his information to that effect, I was willing, if his brother would pay for it, to let him have some proportionate share of my interest similar in amount, perhaps not identical, with the amount that Wilson had proposed to take.

336 X Q. When was this contract made with James M. Patrick?

317 A. I do not know the date.

337 X Q. How long was it after the contract was made with Wilson?

A. I can't fix the date as to that. My recollection is the contract with Wilson was made on the day or day after the contract was made and entered into with Mr. Stebbins, but it was not reduced to writing or a memoranda writing made of it, as I recollect, until some time after, when, at the suggestion of Mr. Patrick, William F. Patrick, the arrangement with Wilson was put in writing and a paper drawn, so as to get Mr. Wilson's signature to it, but that was not the date of the arrangement with Wilson. The real arrangement was, as I have stated all the time, on the Stebbins contract.

338 X Q. Now, in what manner was J. M. Patrick to pay for an interest obtained from you that you agreed to?

A. Pay for it in money.

339 X Q. When?

A. I do not recollect the details of it. I know he didn't pay anything; I feel very positive of that.

340 X Q. How do you know that?

A. Oh, if he paid me anything I would recollect it; I feel very certain of that.

341 X Q. Are you positive he never paid anything on that contract?

A. I am very certain he never paid anything on it and that is my recollection, and I will state that my recollection is that he said that he was willing I should sell out to Will., and that he thought he could make a contract with Will. to secure an interest from Will., and that leads me, refreshing my recollection as to the fact, to conclude that he didn't consum-ate or obtain rights from me because he hadn't paid anything; if he had, it would fully release me when he came to me for his brother to get me to sell out to his brother.

342 X Q. Where was this contract made with Jim Patrick?

A. Whatever contract I had or any memorandum made
318 of it must have been made in St. Louis. I do not recollect ever seeing Jim anywhere except in St. Louis or about the streets of St. Louis during that period of time.

343 X Q. Wasn't it the understanding that J. M. Patrick should pay you up at the expiration of a year, and that you were to make advances for him; in other words, that you were to carry him in the performance of that contract?

A. I cannot recollect any reasons why I should be carrying James M. Patrick.

344 X Q. I refer you to a letter introduced in evidence on yesterday.

A. It must have been, but I do not recall it; if you can refresh my recollection I will state to you. I do recollect distinctly, however, that when I came at his solicitation to make the deed transferring my fourth interest to his brother that whatever arrangement there was between him and I was fully released on his part, he having paid nothing; I recollect that distinctly.

345 X Q. You recollect that he paid nothing?

A. I do; and released all claim by reason of it.

346 X Q. Was there any written release of his interest drawn at that time?

A. I cannot say that there was, because—that is, I had not given him any deed of transfer; I might, however, by way of memoranda or something of the kind, made use of the expression and said that I would be willing if he paid so much at the end of the year, etc. The thing had not terminated, and he said he would release all claim on that, as he had not paid anything, and he did so, and I conveyed a full fourth to William F. Patrick.

347 X Q. He said at that time he had paid nothing on this contract to you, did he?

A. I don't recollect the expression he used, but he knew and I knew that he hadn't paid anything, and that was what he admitted
319 when I made the transfer to William F. Patrick under the circumstances I have narrated.

348 X Q. In your letter presented yesterday of May 11?

A. I wish to restate that the idea of giving him an interest was on account of the information received by me from William F. Patrick that Wilson would not carry out his arrangement.

349 X Q. You have already stated that. Now, in your letter of May 15, 1882, to William F. Patrick, you say, "Your purchased interest I agreed to carry and am willing to." What is meant by that?

A. My recollection would be as I have stated—that after William had informed me that there was no probability that Wilson would pay anything; that Wilson had or would be forfeited out, as he had assured me on May 6th there was no question as to it; that I had stated if Jim wanted to take an interest, either a third or a fourth, that I would not object; that I would consent he might do so, and if Will. wished to be carried during his payments or something of the kind or for some time, I don't know but I objected, but I have no distinct recollection that I objected, but I would say from this letter I probably agreed to carry or to make some advances for him until he got his money.

350 X Q. Was the agreement between you and James M. Patrick at that time that you were to carry his interest for a year, and that you were to advance the money that would be assessed against his interest for a year and have a settlement with him at the end of the year?

A. I don't think I had any contract with him whatever as to that matter at all.

351 X Q. Was that contract in writing—James M. Patrick—my question is?

A. Oh, James. I repeat, after I received this notice that Wilson would not come in, and that there was no probability of his coming in, that I did tell James I would let him have a third or a fourth, but I have not a matter of recollection as to agreeing to pay for him, but I may have promised Will., who was importunate to
320 obtain money at that time, that I would temporarily carry his brother's interest, and probably that is what the letter refers to.

352 X Q. What is your recollection about that?

A. I say that is my best recollection of the matter.

353 X Q. That you would temporarily carry him?

A. That is my best recollection, and that matter may have been put down in writing, but I have no recollection of signing any writing. If I did sign any writing, I probably should have taken it up when I made my deed to Will., as I know it was made with James' consent, he having paid nothing at that time.

354 X Q. Did you ever have a settlement with James M. Patrick for the expenses that would be assessed against the interest that you agreed conditionally, as you say, to transfer to him?

A. I feel certain I had no settlement with Patrick, James M., because he paid nothing to settle.

355 X Q. Did you ever settle in any way?

A. If you call it "settle," we settled when he said, as he and I knew that he had not paid anything, and that he relinquished all rights when I sold out to Will., on his solicitation, on the 19th of October.

356 X Q. Had you recognized James M. Patrick's interest down

to the 19th of October, when you say you conveyed your interest to William M. Patrick?

A. I can answer more readily if you would ask me what has been done. I do not know what significance you may attach to the word "recognize." I would rather you would ask me what had been done or said, and then I could remember in reference to it and will be pleased to answer.

357 X Q. Did this arrangement with James M. Patrick continue to the 19th of October, 1882?

A. My best recollection is that this was made some time before June. He paid nothing upon it; hadn't paid anything upon it at the time I transferred to Will., and I can't remember that
321 anything had come to be due by reason of it, or that anything had been done under it. That is the best of my recollection and impression, that nothing had been done under it, and he expressed his willingness that I transfer my interest entire to William, and that I done so.

358 X Q. I will ask you if, on the 25th of June, 1882, you had a settlement with James M. Patrick, in which you took his note for the amount that would be assessed against the interest that you agreed to transfer to him.

A. If I did, I don't recollect it. As I have said, I don't recollect any transaction with James. I feel sure he never paid me any money, and I don't recollect any transactions with him.

359 X Q. I now exhibit to you a note dated St. Louis, June 25, 1882, which we offer in evidence and which reads as follows:

"$245.75. ST. LOUIS, *June* 25, 1882.

Nine months after date I promise to pay to the order of Frank J. Bowman two hundred and forty-five dollars, at the Boatman's savings bank, St. Louis, for value received, with interest at the rate of ten per cent. per annum, due March 5th, 1883.

(And signed) JAMES M. PATRICK."

And I will ask you whether that note—the body of it in your handwriting—whether that note was executed and delivered by James M. Patrick to you on the day mentioned.

A. The body of this note, so much as is not printed, as also the endorsement on the back of it, "Paid on the within $150 January 20, 1883," appears to be in my handwriting.

360 X Q. Can you state what that note was given for?

A. I can't recollect.

361 X Q. I will ask you if it was not given by James M. Patrick to you in payment of one-sixth of the sum of $1,474.46, the gross amount that was due from you to William F. Patrick and James Patrick and William H. Wilson, for working the Col. Sellers mine under the Stebbins contract at that time.

322 A. I don't recollect and I can say why, by looking at the paper, that I would not recollect it in connection with this transaction, as it seems nothing was paid on it until long after I parted with all my fourth interest in the Col. Sellers to William

Patrick, and I had so many notes and so many transactions that I can't recall it.

362 X Q. Will you answer my question and state that that note was not given by James M. Patrick in settlement of the amount due from him to you upon the interest that you agreed to transfer to him in the Col. Sellers contract?

A. I certainly will not swear that a thing isn't so when, as I have told you and repeat, I have not a recollection about the transaction.

363 X Q. Was that note paid to you in full?

A. I do not recollect. There is a memorandum; I don't know in whose handwriting; it is not in mine; "Paid by check, March 17." I have no recollection concerning the note at this time.

364 X Q. Do you claim that there is anything due to you on that note of James M. Patrick?

A. I do not recall the transaction. It may relate to this matter; it may relate to money that I may have let him have; I don't know. I loaned him money (I found some of the notes); I loaned money between March and June 15 in different sums and in notes, but I can't remember whether this was a loan or whether it related to that transaction; I don't remember the note.

365 X Q. Now, will you answer the question? (Question repeated.)

A. I think I have answered. I certainly do not claim on a note of which I have no remembrance, only that you produce a note here for certain money that seems to have been given at the date indicated. My recollection was and is that no money had been received by me from James M. Patrick when I sold out. That is the best of my recollection.

323 366 X Q. You stated a moment ago that James M. Patrick on the 19th of October, 1882, fully released to you all interest that he had in the contract which you made with him?

A. He requested me to make this very sale to William of my fourth interest.

367 X Q. That don't answer the question, Mr. Bowman. The question is in regard to this statement that he released it to you. Is that correct?

A. My understanding of his request for me to sell and transfer my fourth interest to Will., my not having made any deed of transfer to him, had that effect.

368 X Q. Does the basis of your statement that James M. Patrick fully released all interest that he had in the contract he made with you rest upon the fact that he requested you to convey the entire fourth interest that you claimed in the property to William F. Patrick?

A. Yes; I base my calculation upon the fact that he requested that conveyance to be made, and from that that he released any title that he might claim in the property, for the conveyance was made by his request to his brother of a full fourth interest.

369 X Q. Did he by an instrument in writing or by an oral declaration, on the 19th of October, 1882, release to you personally his interest in that contract he made with you?

A. He signed an agreement, according to my recollection—not an agreement, but a request in writing—that I should convey the whole one-fourth interest in the Col. Sellers mine to William F. Patrick. That is my recollection.

370 X Q. That don't answer the question.

A. It is to that I have been making reference in my answers.

371 X Q. The question is, did he, by any declaration to you, release to you personally or otherwise than by this request that you convey to William F. Patrick his interest in the contract he made with you?

324 A. To the best of my recollection he signed no other paper than the one to which my previous answer refers.

372 X Q. Did he make any verbal declaration of any such intention?

A. Nothing further than that he wanted me to do it.

373 X Q. By that written statement?

A. At the time when we had the conversation I refer to, when I asked him if it was all right and wanted to know from him whether they had struck ore or not and if the thing was all straight, and he assured me, as I repeated yesterday, that it was simply an experiment with Will. to go on further, and that I might transfer the whole title to Will., and that he was willing I should do so, and as there had been some negotiations between us I asked him to sign a request to that effect.

374 X Q. Now, I come back to the question again, because I wish an answer.

A. (Continuing:) And if he had given me a note at that time in the matter I don't think I had it in mind. I can't say; I am so careless; and in looking over my papers I have found more than two thousand dollars in small notes.

375 X Q. Do you want that all down?

A. Yes; because it shows that I have let it run out of the perior of time.

376 X Q. Now, I ask whether, aside from the written request that you say James M. Patrick made to you to convey your entire interest in the Col. Sellers property to his brother, William F. Patrick, there was any other paper or any other verbal statement on the part of James M. Patrick by which he released to you personally his interest in that contract.

A. I answer I have no recollection of any other paper being signed than the one to which I have referred, which I considered as a release of all claim upon me of any interest in the Col. Sellers mine; and as to the verbal statement that you wish, all that occurred verbally. As far as I can remember it, I will repeat

325 the substance of what occurred verbally.

377 X Q. I am not asking what occurred there as to all the conversation, but as to the verbal statement by which he released to you personally his interest in the contract.

A. The best answer I can make to the question in that form is by telling you as near as I can remember what was said.

378 X Q. I object to your stating unless you——

A. (Continuing:) Which it seems to me your question calls for.

379 X Q. You can answer the question yes or no, and I do not see any advantage to you in repeating that each time.

A. I do not wish to repeat; only you wish to have a verbal statement given.

380 X Q. I ask simply whether he made any verbal release to you of his interest in that contract that he made with you or whether you rely for your statement entirely on the written request that you convey the whole of your interest to William F. Patrick.

A. The written request was made in pursuance of a conversation and in connection with it that we then had, and that conversation which we then had I cannot recall the words of it nor the particulars of it further than that I recall that I wished to know, as I had come out of the woods and had not had a chance for information as to what had been going on, and I wished to be informed if it was really true that they had discovered nothing and that that was in good faith—this transaction—and what they desired only to get a transfer for, viz., the amount of machinery there, and he assured me it was and that Will. was going to take the chances on it, and there was some conversation as to whether he was going to pay or not, and he said he didn't claim anything on it, in substance, and I told him he better sign a request for me to convey to Will. and that would fix it, and my recollection is that I then drew up a
326 paper that he should request me to convey to Will. That is my recollection of the transaction as it occurred, and that I done so.

Counsel for the defendants moves to strike out all of the witness' answer concerning representations made to him by James M. Patrick in regard to the condition of the mine and the existence of ore in the mine as not responsive to the question and as being irrelevant, incompetent, and an attempt on the part of the witness to inject into each answer that he makes an argument instead of answering the question.

A. I only meant to answer responsively the whole question as to what was done orally as well as in writing, and to give you the oral statement that occurred as near as I could so that you might infer whether it was released or otherwise, and not to pass on a question of law as a witness.

381 X Q. Now, for the purpose of refreshing your memory as to the note that has been presented to you, I present to you a written instrument signed by you and James M. Patrick, dated the 25th of March, 1882, and I ask you to examine it and state whether you know anything about it.

A. On your refreshing my recollection by these papers, I think that it is probable that this note and that agreement were made and signed at the same time.

382 X Q. What makes you think so?

A. (Continuing:) And probably on the day I left St. Louis. I did not prepare this paper that you have called my attention to, but it

bears date March 25, 1882, and it is my signature, as also that of James M. Patrick, that is attached thereto.

383 X Q. In whose handwriting is it?

A. I do not know the handwriting at this time. I have seen that handwriting, I am sure, at some time, but it is not mine.

384 X Q. Was it written by any one in your office?

A. Mr. Martin was the only clerk that I had at that time.
327 and it is not his handwriting.

385 X Q. Was it written by anybody in your office, any one that you know?

A. I can't say at this time in whose handwriting it is, only there is something familiar about it that I notice. Whether it is Patrick's or whose I don't know. It is somebody's handwriting I have seen before, I think it is, but I can't tell whose, and I think these papers, this note of June 25 and this paper, was signed at the same time and signed probably in a hurry the day I left St. Louis, as I am usually on that day very much crowded with matters, and I think that we both signed at the same time. I do not remember the fact of ever signing it, and the reason was because I was not engaged in that matter or concerning it in July, and one of the first business matters I attended to when I came back in that fall was to transfer away all my interest, and with that transfer my recollection of the incidents of the matter passed from my mind after a lapse of time.

386 X Q. In your letter of May 15 you say that "your purchased interest I agreed to carry and am willing to do so." Does that refer to this contract?

A. That refers, as I have said, to a conversation that I had with him in reference to it, and I cannot now readily see why I would not remember it. I don't think any contract was made at that time or anything paid or anything done, and I would, by being refreshed by these papers and the circumstances connected with my movements, be of the opinion and impression that he came there and had that paper signed and gave a note on the 25th of June, when the note is dated. The note probably bears the true date, and the contract was probably given and signed the day the note bears date.

387 X Q. Why was it dated the 25th of March, 1882?

A. So as to make it correspond with the three months of the note. He would have it dated back three months to make it tally,
328 and the note is probably the true date.

388 X Q. Wasn't the note made for nine months so as to complete the full year from the date of the contract?

A. The note was undoubtedly made the day it bears date, because I am very careful——

389 X Q. There is no question about that, but the question is whether it was not made payable in nine months so as to make it become due at the end of the year, commencing on the 25th of March, 1882.

A. My impression—of course, I can't state a definite recollection, and don't propose to, as it is utterly impossible for me to do so—but my impression would be from the course of business, and my recol-

lection is refreshed by papers or otherwise. I could not recall the incidents that they were given together. I may be mistaken in the matter. It is more an impression and deduction from circumstances than a matter of absolute remembrance, for as to that I have none as to these incidents.

390 X Q. Now, by this agreement, dated the 25th of March, 1882, and signed by you and James M. Patrick, you agreed to make all the necessary advances of money for the purpose of carrying this one-sixth interest which you agreed to transfer to James M. Patrick for a period of one year, and James M. Patrick agreed to repay you all moneys that you had expended for him at the end of that year, and this note being given on the 25th of June (March), a note payable in nine months, which will be one year from date, of the contract, doesn't that enable you to state that the note was given for the amount that was due from James M. Patrick to you on that contract on the 19th of June, 1882?

A. As a matter of remembrance it would not, because I state again I have not a remembrance of the transaction. I have so many details of business and details of transaction that I cannot recall.

329 Mr. PARSONS: Now, this contract of the 25th of March, 1882, I ask that it be copied in the record in order that we may take the original with us for future use.

(The contract was then read as follows:)

"This memoranda of agreement, witnesseth:

That James M. Patrick, has this day purchased from Frank J. Bowman a one-third of his one-half interest in the property adjoining the A. Y. mine near Leadville, Colorado, the same being the property acquired by contract with Stebbins and others in which William F. Patrick is a one-half owner; the consideration of this agreement being the sum of one dollar this day paid; and the further consideration that said James M. Patrick is to pay a one-third of the cost to said Bowman in carrying out the contract for sinking a shaft on said premises; that is to say, said James M. Patrick is to pay a one-sixth of the total cost, and said Bowman agrees to make all necessary advances of money for said purposes for one year, and save said James M. Patrick from the necessity of making advances during said period of time; and said James M. Patrick agrees to well and faithfully repay to said Bowman within twelve months from this date all sums so advanced by him on account of this contract, and pursuant to the terms thereof.

Signed in duplicate, this 25th day of March, 1882.

FRANK J. BOWMAN.
JAMES M. PATRICK."

Now, following the signature is written "having acquired by purchase the interest of Frank J. Bowman in the within-described property, I hereby agree to assume his obligations under the within contract." Dated "October 21, 1882," and signed "W. F. Patrick."

Now I will ask you, Mr. Bowman, in whose handwriting are the words I have last read, signed by W. F. Patrick?

330 A. I can't say; it looks so much like my own handwriting that it tempts me to say it is mine.

391 X Q. That signature is exactly like yours, isn't it?

A. It looks like my handwriting. I think it is.

Mr. PARSONS: We desire now to introduce the note referred to, dated June 25, 1882, together with the endorsement.

(Note and endorsements read.)

392 X Q. I call your attention to the portion of the contract signed by W. F. Patrick, dated October 21, 1882, and will ask you if that does not enable you to state that you are mistaken in your statement that James M. Patrick released to you his interest in the contract that he made with you.

A. On the contrary, it confirms me in the idea that so far as any title in the property was concerned or claim in it that he released me, and, as I believe I have previously stated, he said he would arrange with William as to his matter. I stated originally that was my impression and that paper confirms my recollection.

393 X Q. This paper shows that W. F. Patrick simply stepped in and assumed the performance of the contract and whatever obligations rested on you on that contract.

A. It shows what is written on its face, no more and no less, and if you will refer to the note and the papers, that also shows I was correct in my recollection that Mr. Patrick had paid me no money—James M. Patrick—down to the date of the transfer, and as to that I refresh my recollection by examining my cash book.

At this point a recess was taken until 2.30 p. m.

After Recess.

The examination of FRANK J. BOWMAN was continued as follows:

331 (By Mr. PARSONS:)

394 X Q. Now, you may state, if you can, when William F. Patrick first made overtures to you to purchase your interest in the Stebbins and Robison contract.

A. I can't give the date at this time.

395 X Q. Have you any recollection about when it was?

A. As a matter of recollection, no; not definite.

396 X Q. I have not asked for any definite statement.

A. As a matter of inference I should say August, 1882.

397 X Q. Have you any knowledge of any overtures made to you for the purchase of your interest by William F. Patrick prior to August, 1882?

A. No remembrance at this time. If you can refresh my recollection I would be pleased to fix the date.

398 X Q. Have you any letters that will inform you or from

which you could say that any overtures were made to you by William F. Patrick prior to August, 1882?

A. I have no letters, as I explained this morning.

399 X Q. Have you any knowledge of any letters that will give you any such information?

A. The package of letters that I have seen I think would throw light on that subject.

400 X Q. Are the letters contained in the package you have mentioned the only letters from which you could gather such information?

A. It is my impression that such letters are in that package. I may have seen others; but, if so, I do not recall them.

401 X Q. I will ask you whether the letter dated May 21, 1882, which you have produced and which is a letter from William F. Patrick to you in which this statement appears: "If you do not feel disposed to go ahead under these circumstances I think I can find some one else who will go in with me." Does not that refresh your memory as to the beginning of the overtures upon the part of Mr. Patrick to purchase your interest?

332 A. No; it refreshes my recollection as to the fact, and my recollection has also been refreshed from other sources as to the fact, that there was a difference existing in our judgment as to the proper mode of proceeding under our contract prior to June, and Mr. Patrick was in favor of "rushing," as he termed it, the work as fast as possible, but a matter had arisen in the form of a dispute as to the title, and I had thought it a more conservative course to do so much labor as was necessary to keep good our contract, whatever that was, and to go a little slow as being a safer way in which to protect our interests, and it was with reference to these matters that there was some correspondence between us at some time prior to June, 1882. It was that, as I now recall, that probably gave rise to the expression to which your question refers.

402 X Q. You speak of a difference of opinion existing between you and Mr. Patrick as to the manner in which this work should be carried on, and that Mr. Patrick was in favor of "rushing" the work, and now do I understand that you were opposed to that manner of working the property?

A. I do not mean to be understood that my opposition was other than a difference of opinion which I suggested to him, probably in the form of a letter. We had some talk about the matter, as I recollect also.

403 X Q. And what was the opinion you expressed to Mr. Patrick in the form of letters or otherwise?

A. As near as I recollect, it would probably be safer for us to do such an amount of work as to keep good our contract, so that we should not lose it, and to have determined the right of these jumpers, I think he called them, the parties endeavoring to interfere with our property, before spending a large amount of money, and so I suggested to him that that seemed to be a more prudent course, but his idea was, as he expressed it, to rush the work, "beat them

333 to mineral," or something of the kind; that is as near as I

have the matter in recollection. That was his view, and my view, like that of a lawyer, was to enjoin them and test our rights legally in court, and not to have the unseemly scramble which was likely to arise, as I was informed.

404 X Q. What plan did you suggest that would enable you to preserve your rights under the contract without doing much work?

A. I do not recall the details of the suggestion. I only recall this general question was involved, and in the suggestion that undoubtedly was given by me then I had a more familiar knowledge of the details of what the contract was.

405 X Q. Did you suggest that a little work should be done during every ten days or in each of the ten days of the period for which the contract was to run, so as to save a forfeiture, and not to do any more than that?

A. Presuming that it be true that the contract called for some work every 10 days, I would presume, probably, it was my idea that we should conform strictly with the contract, so as to keep it good, with as little expense as possible in fairness, until the legal question might be determined in court, and my recollection is that injunction proceedings were talked of—promised by Mr. Patrick to be commenced.

406 X Q. Now, then, assuming the contract provided that a suspension of work or a failure to do the work for ten consecutive days would work a forfeiture on the part of you and Mr. Patrick of the contract, then state your recollection of the understand- that you advised that only a little work should be done in each ten days, in order to keep the contract from being forfeited, and not rush the work, as Mr. Patrick was disposed to do.

A. Your questions are so lengthy and you take so many statements in them that it is impossible for me to answer them satisfactorily without being equally prolix myself, which I dislike
334 to be in this examination. Can't you abbreviate your questions in form so that I can answer them directly?

(Last question repeated.)

A. As your question now stands, I can only say that my answer is as made to your previous question. I will add that I was certainly careful not to suggest the doing or omitting to do anything that would under our contract, as then understood by me, forfeit it.

407 X Q. Did you examine the contract at that time for the purpose of determining, in your judgment, how the property should be worked so as to save a forfeiture?

A. I was undoubtedly familiar with the terms of the contract at that time.

408 X Q. Didn't Mr. Patrick inform you about that time that in order to save the property it would be necessary to work diligently and actively so as to beat the conflicting claimants to mineral?

A. About the time that I have referred to Mr. Patrick advised or stated that he would have an injunction applied for and legal steps taken to test the rights of these adverse parties.

409 X Q. Did he not advise you at that time that he was advised

by his attorneys that he could not obtain an injunction for the reason that the Col. Sellers claim had made no discovery of mineral or rock in place?

A. No; not at that time, but, on the contrary, advised me that he would confer with attorneys and have an injunction or other proper remedies applied, and it was pending such proceedings I suggested the doing of a moderate amount of work each day, and he informed me that for some reason—I do not recall the particulars of what it was—that the attorneys were of the opinion that they could not maintain an injunction; and then the work proceeded and we went on, and when he presented his bills they were paid. This matter of objection you have spoken of to the work proceeding rapidly was a matter that occurred early in the operation of the sink-
335 ing of the shaft, or comparatively early.

410 X Q. Did he not in his letter of the 21st of May inform you "that the application for the injunction has not been commenced yet, as several of the best attorneys here have advised against it and say that the judge wouldn't grant it, owing to the fact that as yet we have no mineral in place, and that therefore our claim is not a legal one"?

411 X Q. My recollection is he so wrote to me. That is my recollection, in substance, as you have stated.

412 X Q. Do you recollect this statement also contained in that letter: "The only way we can save ourselves is to go ahead and beat them to mineral, which we can easily do notwithstanding the delay"?

A. That was my recollection, as stated by me a few minutes ago.

413 X Q. Now, then, was there any difference existing between you and Mr. Patrick as to the manner in which this property should be worked under the Stebbins and Robison contract after you had been informed by this letter of the facts I have just called your attention to?

A. I repeat again that these suggestions of mine were made at a date earlier than the representations of Mr. Patrick, to which you have last directed my attention, and at those earlier dates he did promise that he would get out injunction proceedings and adjust our rights before we laid out a large amount of money, and my suggestion as to going slow had been made prior to that date, and probably what you have indicated may have been to some extent a response to these suggestions.

414 X Q. Now, then, you have not answered the question. My question is that after the receipt of this letter of May 21, at any time after that, was there any differences existing between you and Mr. Patrick as to the manner in which that property should be worked under your Stebbins and Robison contract?

336 A. I do not recall differences after that date. If any differences arose you could perhaps refresh my recollection by specifically directing my attention thereto, but I do not recall any now.

415 X Q. Now, I will call your attention to the contract prepared and signed by you and dated August 28, 1882, and which you have

identified as being in your handwriting, and in which these words occurr, "and said Bowman has been and is unwilling to continue said work in such manner as said Patrick desires or to pay any of the costs thereof if continued in such manner as said Patrick has directed." I will ask you if that is not an evidence to you that there was a disagreement between you and Patrick as to the manner in which this property should be worked down to the 28th of August, 1882.

A. No, sir; my recollection now of the matter is that Mr. Patrick had sent me a communication, which I received about the time we wrote that agreement, representing to me that it would take some $9,000 more to go ahead and go down to the "second contract," I think is the expression used. I am not familiar with mining terms enough to know, but it was something he wanted to do, and to put in a large amount of machinery or something of the kind, and I didn't think it was necessary to do things in that manner or in accordance with our contract to sink down a shaft to find mineral, and it was on account of Mr. Patrick's representing that he wanted to do things of that kind that gave rise to that expression; this other matter had practically ceased and terminated, as I now recall, before this—before the 19th of June.

416 X Q. Do you mean that the contest with the jumpers was ended at that time?

A. I do not.

417 X Q. Then what matter do you say was practically settled at this time?

337 A. Between Patrick and myself; that he would go on in sinking the shaft without injunction proceedings or without attempting to stop the other parties; that he would go ahead with the work according to the contract we had made with Stebbins.

418 X Q. That part was settled?

A. That part was settled, as I understand; all settled.

419 X Q. And then this disagreement that is recited in the contract of the 28th of August, 1882, to which I have called your attention, you say refers to a difference of opinion between you and Mr. Patrick as to the sinking of the shaft on the Col. Sellers claim to a "second contract"?

A. No; I didn't state that. I stated I was not familiar enough with mining terms to know exactly what he proposed, and could not recall from recollection; but I do recall it was a proposition on his part to spend some $9,000 in money in elaborate preparations that had never been contemplated, and in his letter to us, or to me, as I now recall, he represented that that would be necessary before we could determine whether there was any mineral or not, and that that representation came to me about the time or about the date I signed that contract.

420 X Q. Where is that letter?

A. I said to you that if you had not urged and insisted upon going on with my examination now I was in hopes to have had all my letters and papers and to have given you a more satisfactory

and definite statement from them, but you having insisted on going on before I could get control of my papers, I have had to state to you in this desultory manner, the best way I can, the facts, which I would have been glad to have you in a more definite form.

(Last question repeated.)

A. I can't answer your question any more definitely than I have previously answered as to the letters—that or any other one.

421 X Q. Is this one of the letters that was handed to you
338 by Judge Laughlin which you have spoken of?

A. I have not so stated.

422 X Q. Well, suppose you state it now.

A. I can't state what I don't know; at least, I shall not.

423 X Q. You can state that you don't know, can't you? You can tell whether or not that letter was in that package?

A. I have not referred to any particular letter in my answer, and I can hardly think you understand me so. I said my recollection was that that contract was signed on the day or about the time—that I remember from a matter of recollection and not from letters, but from recollection—that Mr. Patrick informed me (and that that was what moved me to part with my interest) that it would take $9,000 more to go down to find whether there was any mineral or not, and, receiving such information in the latter part of August to the effect that I have indicated, I was induced to sign that letter that you have termed a contract—a paper signed by myself and not signed by Mr. Patrick, or to which he was not bound until the 19th of October, when through his brother we completed the sale.

424 X Q. Now I return to my question again and ask you whether or not you know that the latter that you received from William F. Patrick and which induced you to sign this paper was in the package of letters handed to you by Judge Laughlin of which you have already spoken.

A. There were letters referring—at least, one—to that subject, I think, in that package.

425 X Q. Was the letter of which you have spoken in that package?

A. I have not spoken of the letter or a letter; at least, I have not understood myself to so speak.

426 X Q. Did you not state a moment ago that you received a letter from William F. Patrick on the day or about the date you signed this paper representing to you that it would cost some
339 $9,000 more to further explore for mineral?

A. I have said, and repeat that my recollection is, I received information from Mr. Patrick, received by me about that time by letter or letters—I have not said a letter or the letter; how many I don't recollect—that gave me that information upon which I made that proposition, which was not closed until the 19th of October, being simply a proposition signed by myself and which I was induced to sign by such representations. Whether the particular letter or any particular letter or the last letter preceding the signing of that was with that package in Judge Laughlin's hands I am not able to say,

but my best impression is that particular letter was not, but has still been retained in the trunk which is in my wife's possession, and I hope to be able to produce them all and expect to.

427 X Q. Then at this time you have no such letter as you have stated you received from William F. Patrick about the date of signing this paper in your possession or within your power to produce, have you?

A. I will repeat the answer I have made several times to similar inquiries propounded by you, that I have not at this time or in my power to produce any of the letters written to me by William F. Patrick; that I have received or been permitted to examine some portion of the correspondence, and that I am informed the trunk contains a considerable portion of my correspondence, and I therefore hope to be able to produce all the letters that Mr. Patrick has written me. Whether I will be able to or not depends on whether they have been carefully preserved by my former wife in that trunk—whether we will produce them all or not.

Counsel for the defendants now offers in evidence a contract or paper dated the 28th of August, 1882, and signed by Frank J. Bowman, and which is in the words and figures following, to wit:

340 "Memoranda of agreement made and entered into this —— day of —— A. D. 1882 by, and between Frank J. Bowman of the city of St. Louis, State of Missouri, and William F. Patrick of the city of Leadville, State of Colorado, witnesseth—

That whereas, said above-named parties did on the 17th day of February 1882 enter into a certain contract in writing with Theodore C. Stebbins, Lyman Robison, Samuel J. Glover, and Harvey Howard, by the terms of which written contract the said Bowman and Patrick in consideration of the conveyance to them by said Stebbins and others above named, of the undivided one-half right, title and interest in, and to the Col. Sellers lode and the Accident lode, two mining claims, and agreed to sink a shaft upon one of said mining claims to pay mineral or limestone in place, and

Whereas, considerable work and development has been done and performed on said Col. Sellers lode, and the expense thereof has been borne principally by said Patrick, and said Bowman has been and is unwilling to continue said work in such manner as said Patrick desires, or to pay any of the cost thereof if continued in such manner as said Patrick has directed, and

Whereas, on the 19th day of June 1882 said Bowman executed and delivered to said Patrick a certain promissory note of that date for the sum of $288.70 due ninety days after date and bearing interest at the rate of 8 per cent. per annum, which note was for the full amount of said Bowman's proportionate share of the costs and expenses of working said Col. Sellers lode which then remained due and unpaid, all previous amounts having been fully paid by him, and

Whereas, said Patrick has in consequence sold said note, now therefore it is hereby agreed by the parties hereto that the said

Patrick will pay said note when the same becomes due and
341 payable, and save the said Bowman from the payment of the same or any portion thereof, and in consideration thereof the said Bowman will release and surrender to said Patrick all the remaining interest in and to the above-described contract so made with said Stebbins and others, and to the property described therein, reserving and excepting for the use of the brother of said Patrick a one-sixth interest in said contract if he shall so elect to pay his assessment thereon.

The said Bowman further agrees on the payment of said note and the surrendering of the same to same, to execute and deliver to said Patrick a good and sufficient deed of conveyance of his right, title, and interest in and to the mining property described in said contract and known as the Col. Sellers and Accident lodes mining claims, situated in the California mining district, Lake county, Colorado; and the said Patrick agrees on his part upon said conveyance to him to release said Bowman from any and all liability under said contract so made with said Stebbins *et al.*, and to save said Bowman from all or any such liability.

Witness our hands and seals this 28th of August, 1882.

(Signed) FRANK J. BOWMAN."

Will you state more definitely what is meant in this paper that I have just read by the words "Said Bowman has been and is unwilling to continue such work in such manner as said Patrick desires"?

A. I don't know that I can add more to what I have said on that subject further than that my recollection is that he had forwarded to me by mail a printed statement as to the amounts necessary to carry out his idea of going on until he could discover mineral, a statement that seemed to me quite remarkable in view of representations as to the cost that had been made just before I left to go fishing in June—there is nothing else I remember—and which he, by the statement as sent to me, seemed to have paid in the time
342 between June 19 and the time when that was written; that is probably what I had in mind in the expression "the expense thereof has been borne principally by said Patrick." It was for a pretended expenditure of a very large sum in a very short space of time that I will say I began to be suspicious of being overcharged, and also from his representations that it would require a large amount to go ahead until we could find out whether we were going to get mineral or not.

428 X Q. Now, will you take notice that this expression contained in this contract has no reference to any sum of money or any difference concerning money matters, but that it refers exclusively to the manner in which the work is being done, and that you were unwilling to continue the work or to pay for it being done in that manner?

A. I do not wish to enter into an argument as to the facts with you as to the meaning of the words in the contract. I have stated my recollection as to the way I signed that proposition.

429 X Q. Does not an inspection of the paper show to you that you are mistaken in saying that the differences arose over any money matters, money expended by Patrick, instead of the manner in which the work was being done?

A. On the contrary, the manner in which the work was being done only affected my mind, so far as the very large amount of money that he represented it would cost, because mineral had not yet been discovered, and a very large amount more had got to be paid down, and that he proposed to put in a large amount of heavy machinery for the purpose of sinking down to a greater depth than it was anticipated or expected—that is what it refers to—in the manner in which it is being done; that is my recollection of what was in my mind at the time of writing the words.

430 X Q. Now, I will ask you if you wish to say under oath that that expression does not refer to your unwillingness to con-
343 tinue the work as Patrick had desired, diligently, or rushing it as he expressed it, instead of doing a little work in each ten days in order to save the contract.

A. I have given my best recollection of the manner in which that controversy arose, how it came up, and I have given my best recollection as to the situation of affairs and the information which actuated me at the time the paper you refer to was written. Whether I had wholly changed my mind and come to the conclusion that Mr. Patrick was pursuing a wise course or not, I am in doubt. Indeed I have always thought that it was a very injudicious way of doing business, a haphazard way to push ahead, while the matter was in dispute, if there was a mode, and it seemed to me there always should be a mode, of determining a dispute before investing money, and that may have still forced itself upon me when I was informed that, although large expenses were being incurred and depths sunk down to and nothing yet discovered, no mineral yet discovered, it may have reverted back to me still with force that his manner of proceeding was not judicious. I am not going to say but what that was in my mind; I do not recall particularly that it was or was not.

431 X Q. Don't you know that after the letter which you received of May 21 that your only hope of saving the money you had already expended, or realizing anything on this Robison and Stebbins contract, was by reaching mineral before the "jumpers" reached it; in fact that it became a "race of diligence" between the "jumpers" and yourself as to which would get the claim?

A. No; I don't know that.

432 X Q. Don't this letter of May 21 inform you of that fact?

A. The letter will speak for itself as to what it was.

433 X Q. Now, do you say the first time the differences arose between you and Mr. Patrick, and which you have expressed in
344 this contract of August 28th, 1882, grew out of a letter that you received of Mr. Patrick at about the same date of this paper?

A. No. You have kept on saying "a letter." I have kept trying to get you to understand that I refer to not a particular letter but

to a correspondence or letters or statements received at such time as I may have come out of the woods and received letters, perhaps that had accumulated for a number of days. I had no regular delivery of my mail while in the woods, and received it only occasionally.

434 X Q. You may state if you know how many letters you received from Mr. Patrick while you were in Wisconsin or St. Paul.

A. I don't know as I received any from him, as a matter of recollection, at either place. I know at some time I have received letters directed to me by him at those places. At what time I received them or where I received them I have not in mind.

435 X Q. At what places?

A. At St. Paul, Duluth, or Bayfield.

436 X Q. Bayfield, Wisconsin?

A. Yes.

437 X Q. What was the reason that induced you to draw this paper of August 28 and transmit it to Mr. Patrick at Leadville, Colorado?

A. I have answered you as fully as I am able to at this time on that subject.

438 X Q. I don't think that we have gone into that at all. I will ask you if before this paper of the 28th of August, 1882, was written and signed by you, there had been any agreement between you and Mr. Patrick that such a paper as this should be transmitted to him.

A. I don't recollect any.

439 X Q. Was it a matter of mere voluntary action on your part, the drawing of this paper and transmitting it to William F. Patrick?

A. I should infer there must have been some correspondence preceding it; what the nature of it was I do not now recall.

345

440 X Q. Had Mr. Patrick before this time expressed any derire to purchase your interest in the property, or had he made any proposition to you which you had accepted?

A. I do not recollect, but I should infer from that paper signed by myself that that was the proposition from myself, induced by previous correspondence.

441 X Q. Did you transmit this paper of August 28, 1882, to Mr. Patrick?

A. I should presume that I did from the nature of it.

442 X Q. Was it intended by you to be a complete ending of your connection with that property and with Mr. Patrick?

A. The paper speaks for itself as to the intent of the maker of it very plainly. I do not know that I can explain or add to it.

443 X Q. Had there been any communication prior to the date of this paper by Mr. Patrick, by which you understood that he would accept the terms of this paper when you wrote it?

A. I can't say from memory whether there was or was not.

444 X Q. To refresh your memory I now hand you a letter dated

"Camp Near Brule River, August 28, 1882," which reads as follows:

"CAMP NEAR BRULE RIVER, *August* 28, 1882.

Mr. William Patrick,

MY DEAR SIR: I send you the contract you desire, and trust this will settle our matters pleasantly, and amicably. I have inserted a clause concerning your brother's interest, but he may not care to retain it. My address will be St. Paul until September 10, than I shall return to St. Louis and business.

Yours truly, FRANK J. BOWMAN.

P. S. Mails are slow here."

I ask you if that is your handwriting and your signature
346 to that letter.

A. This paper you hand me is in my handwriting.

445 X Q. Now, I will ask whether that letter does not refresh your recollection as to prior negotiations with William F. Patrick for the purchase of your interest in that contract.

A. No further than I have already stated.

446 X Q. What is meant in the letter by "I send you the contract you desire"?

A. He had evidently, as my recollection was and is, been trying during the month of August, I don't know whether he had before that time or not, to secure from me, for some reason of his own, a release of my interest, and it seems that this was the conclusion reached as far as it went.

447 X Q. Was it on the instance and in pursuance of the desire expressed by Mr. Patrick for the purchase of your interest that you sent this contract or paper of the 28th of August together with this letter of the same date?

A. You understand me to say that I have no recollection as to the correspondence preceding that, and I can only from an inference at this time, which you or any other person could as readily form, from the papers themselves. As a matter of recollection I do not recall the previous correspondence.

448 X Q. Can you state where you were during the month of July, 1882?

A. In the month of July, July 4, 1882, I was about 30 miles from the nearest post office at a place we call Island Camp, Bayfield county.

449 X Q. What is the nearest post office?

A. The nearest accessible post office there is Bayfield.

450 X Q. Where were you on the 13th of July, 1882?

A. About the 13th I was at Ashland, Wisconsin, I think—that is, to the best of my recollection.

451 X Q. I now hand you a telegram, dated Ashland, Wisconsin,
13th, 1882 (13th of July evidently), addressed to William
347 Patrick: "Yours, June 22, received yesterday. Proposition accepted. Send note." (Signed) "Frank J. Bowman", and ask you if you have any recollection of that telegram.

A. I have not, but have recently seen a telegram which I was trying to recall what it referred to, the later telegram saying, "Your answer" (in substance I think). "Your answer too late. Proposition not open." I would infer from that that it referred to some matters that we were trying to negotiate about some other properties there, but I have no distinct recollection.

452 X Q. That is the last telegram you speak of, is it?

A. That is the one in connection with this one. I saw one the other day among the papers—a number of telegrams with the papers Judge Laughlin has in that bundle—the one that seems to have reference to this same subject-matter, and I was trying then to recall what it was, but I could not and don't now.

453 X Q. Do not the words in that telegram, "send note," enable you to state what subject was referred to in the telegram?

A. Oh, no; that would not, because notes were so frequent and occurrence in matters connected with business transactions of any kind with the Patricks that that would not help the case out at all. They most always had a note with everything in those days.

454 X Q. It seems you gave a note, too. Can you state the date of the telegram that you refer to as having been received from Mr. Patrick and which you think has reference to the same subject this telegram has?

A. My recollection is about the 16th, but I am not positive.

455 X Q. Of what month?

A. Of July of the same year.

456 X Q. The date of the telegram at Leadville, when was it signed?

A. My recollection is about the 16th, but that is among the papers I hope to be able to produce.

457 X Q. Do you recollect of sending this telegram, dated
348 Ashland, Wisconsin, —— 13, 1882?

A. Oh, I don't recollect the fact of sending it nor would I have recollected any telegraphic correspondence between us only in looking over a portion of these old papers I found that there was a telegraphic communication and note in one of them that the proposition came too late.

458 X Q. Do you say you are unable to recollect whether the proposition referred to in this telegram was a proposition from Mr. Patrick to buy your interest in the Col. Sellers contract?

A. As a matter of recollection, I do not recollect what that refers to. I can probably find out, on getting the other telegrams, and in that manner refresh myself, and I should not have recollected that any were sent, only that I saw them and had my memory refreshed by it.

459 X Q. I now hand you a letter dated St. Paul, Minnesota, July 16, 1882, which reads as follows:

"Mr. William F. Patrick.

DEAR SIR: I was quite ill soon after you left St. Louis, and almost the last business I attended to was to aid Mr. Howell in getting Flynn started for Denver, thinking that you and Patterson could

then manage Flynn and Zoble. I fear from the tone of your letters you have found it impossible to do so. When I came out of the woods I found your letter of June 22 awaiting my answer and I telegraphed you that same day accepting your proposition to surrender to you all my remaining interest in the property adjoining the A. Y. on your surrendering my note, and on perusal of your subsequent letters received here at St. Paul to-day I learned that is your wish. I do not complain of it. My judgment differs from yours as to the course to pursue, and I should not stand in your way, and will not. If you wish any papers signed send, and I will sign them. My address is Bayfield, Wisconsin.

As to the Colorado Prince matter, I received a letter from Mr. L. N. Buck that is quite a surprise to me. I thought it was
349 duly understood that you were to have a resale of the property properly made so as to make title thereto. It can certainly be done. Thomas & Patterson will tell you so. I conferred with Mr. Howell and gave him a letter to you informing you I had concluded to let Mr. Howell buy in the property, of course to be held for the use and benefit of the consolidation, which I still think will be finally carried out. Please to see Mr. Howell or Mr. Buck and have at least this part of the programme carried out properly, for if you and Howell will obtain and hold title of possession, it is the key of the situation.

Yours truly, FRANK J. BOWMAN."

Does not this letter refresh your memory and enable you to state that the telegram of July 13 is in answer to the proposition from W. F. Patrick to purchase your interest in the Col. Sellers and Accident contract or property?

A. I should have to refer still to the other correspondence that occurred in order to state to what this refers, as there were a number of matters there at that time and as there was another property there, a placer, concerning which, this matter that I had a retainer of $500 and other things, that I can't answer your question satisfactory to my own mind until I have all the correspondence before me with reference to this matter. As I said, I had in recollection a telegram received in which it was stated "too late." My recollection is that anything of that kind was not consummated for the reason that I have indicated, and I should have to look at all the correspondence to determine as to which these matters referred.

460 X Q. Do you mean to say, after reading this letter——

A. The reason I say that more particularly is because in matters relating to this property I invariably, I think, refer to this as the "Col. Sellers mine" and other property by description; that
350 is one reason why, not being referred to in our usual manner, but I should have to look at the whole correspondence before I could answer the question you propounded to me.

461 X Q. Did you write and sign the letter that I have just exhibited to you and which I have just read to the commissioner?

A. No doubt in the world I did.

462 X Q. Do you still pretend to say that after an inspection of

that letter you are unable to state whether or not this letter, the letter itself and the telegram of July 13 that has been exhibited to you, refers to a proposition from Mr. Patrick to purchase your interest in the Col. Sellers and Accident?

A. I answer as before, I cannot from recollection and from the number of matters between us, and particularly as I have in mind the telegram that that proposition was not accepted; that my telegram came too late; I can't tell to what it referred without examination, especially as I had been associated in matters connected with five or six different mines there with Mr. Patrick.

463 X Q. I will ask you whether Mr. Patrick sent you any papers to be signed after the date of this letter.

A. I have no recollection.

464 X Q. You say in this letter, "If you wish any papers signed, send and I will sign them."

A. I have no recollection; but the papers I have looked at thus far I find only one telegram that I now recall—I say only one I recall—saying, "Your proposition received too late to be accepted," and that my recollection is July 16, or some day later than that, referring probably to my telegram of July 13, but I would have to look over the correspondence of him to me before I could answer the question. There is a very voluminous correspondence and telegrams concerning different matters in which Mr. Patrick and I had interests, and, there being such a diversity of them, reference would have to be had to those, and, so far as I have a memory
351 on the subject, this property now in question was invariably referred to by us as the "Col. Sellers" and "Accident."

465 X Q. Had you any interests with Mr. Patrick in any other property adjoining the A. Y.?

A. This bill about this $500 was about some property in the adjoining gulch running right down and adjoining, cornering upon the A. Y.; that is my recollection.

466 X Q. You say in this letter of July 16, "On perusal of your subsequent letters received here at St. Paul to-day I learn that is your wish." Do you remember the dates of the subsequent letters referred to here?

A. I do not.

467 X Q. And do you know whether those letters are in the possession of Judge Laughlin?

A. I do not. I know there is a large number of letters concerning a large number of matters, quite a number concerning the different interests in which Mr. Patrick and I were concerned in that bundle—more than I have read, and I have glanced over the bundle and found it related to our affairs, and there is a large bundle of them.

468 X Q. Mr. Bowman, you may state, if you can, what induced you to send this telegram of the 13th of July from Ashland, Wisconsin, to Mr. Patrick accepting the proposition that he made, and also what induced you to write this letter of the 16th of July referring to the telegram and stating there that you would accept his proposition on his surrender of your note. Were any representa-

tions made to you by Mr. Patrick at that time to induce you to send those letters and telegrams?

A. Not having in mind what transaction the telegram and letter to which you refer have reference, it would be impossible for me to give an explanation of them. When I have examined the correspondence so as to know to what they refer I will be able then to determine.

469 X Q If any representations were made to you at that time, were they made by letter or orally?

A. Representations made to me at that time by Mr. Patrick
352 would have been by letter, as I did not see him personally at the time.

470 X Q. I will ask you whether a draft was drawn on you dated the 5th of July, 1882, for the sum of $952.32, drawn by W. F. Patrick on you through the Bank of Leadville on the 5th or 6th of July, 1882.

A. I do not know. I have no opportunity to know.

471 X Q. Was any such draft presented to you?

A. No; I have no recollection of any such draft being presented to me, and I have no account of paying any such draft. I have no recollection of any such draft being presented.

472 X Q. Where were you about the 10th of July of that year?

A. As I have stated, I was in camp on the 4th of July, as I find by refreshing my memory from our camp record. My best recollection is that I remained in camp until about the 13th, when I went to Ashland; perhaps from there to Madison and then to St. Paul.

473 X Q. Did you receive a letter from W. F. Patrick dated the 5th of July, 1882, in which he notified you that he would draw on you for the sum of $953.32 the next day, and that that was your share of the expenses that had been incurred up to that time?

A. As a matter of recollection or remembering of receiving any such letter, I do not. If you say he wrote such a letter, why I probably some time received it. When, I don't know, nor do I remember I received such a letter.

474 X Q. Did you write Mr. Patrick some time in the month of July in answer to any such letter and state any reasons why you did not pay that draft of $952?

A. I have no recollection of writing any letter to Mr. Patrick and by no possibility could I recall incidents at this time without something to refresh my recollection.

475 X Q. I present to you a draft which reads as follows:

"$952.32. LEADVILLE, COLORADO, *July* 6, 1882.

353 At sight pay to the order of the Bank of Leadville nine hundred and fifty-two dollars and thirty-two cents, with exchange, value received, and draw to the account of W. F. Patrick to Frank J. Bowman, St. Paul, Minnesota, Merchants' hotel."

And I will ask you to look at said draft and state whether or not that draft was presented to you for payment.

A. I have no recollection of such draft being presented to me.

476 X Q. Have you any recollection of writing a letter to Mr. Patrick in regard to it?

A. I have not at this time, but if you will show me anything to refresh my recollection or call my attention to any fact to refresh my recollection I may be able to do so.

477 X Q. Have you any recollection of any draft from Mr. Patrick being presented to you at St. Paul, July, 1882?

A. I have no recollection of any draft being presented to me in July, 1882, drawn by William F. Patrick; but if Mr. Patrick drew such a draft upon me he must have drawn it for some other purpose than that of receiving payment and with some ulterior design, for Mr. Patrick well knew that I had left business and that I was about to go to the woods to remain for the summer, and he well knew from frequent conversations with me that I did not attend to my transactions while I was up in the woods fishing, and if he ever drew such a draft he must have done it for some other purpose than that of expecting payment, if drawn at such a time and under such circumstances. We had particularly settled our money matters in June before I left, so that I should not be troubled with them while I was up North fishing and for my health.

478 X Q. Do you say you have no recollection of any letter written by Mr. Patrick, dated about the 5th of July, notifying you of your share of the expense of working the mine up to that time and that he would draw a draft for that amount?

354 A. I have no recollection of the receipt of any such letter. I have a recollection that I saw a letter which spoke of the matter of a draft in looking hastily over the bundle of papers to which I have referred, and if I received any such letter it may be that and probably is if I received it, and if Mr. Patrick wrote such a letter I probably at some time received it, but cannot have received it, so far as my recollection goes, before the 16th of July. That is an inference from the fact that I was in the woods, where I don't think any mail was brought to me.

479 X Q. Now, I ask whether, after your settlement with Mr. Patrick on the 19th of June, 1882, you ever made any payment to Mr. Patrick or to any one else on account of the expense of working the Col. Sellers and Accident mines under the Robison and Stebbins contract.

A. As a matter of recollection, I can't state. I have no recollection of doing so. As a matter of fact, I don't believe I could have done so, as the settlement was made June 19, the note given to be paid in 90 days, and the sale which Mr. Patrick induced me to make was made before any other moneys were paid, I think. That is my best recollection on the subject.

480 X Q. You knew at the time you gave Mr. Patrick that note, on the 19th of June, for $288.70 that he intended to negotiate or dispose of it to some bank and raise money on it at once, didn't you?

A. I don't recollect.

481 X Q. You knew it while in Wisconsin, on the 28th of August, didn't you?

A. I don't recollect.

482 X Q. Don't you recite in the contract made on the 28th of August: "Whereas said Patrick has negotiated and sold said note"?

A. The contract will show; I don't recollect; he may have done so, but I don't recollect; it is so recited. I think there is something to that effect in the contract.

483 X Q. "Whereas said Patrick has negotiated and sold
355 said note." Now, then, you knew the date of the disposition of that note while you were in the woods, on the 28th of August, 1882, didn't you?

A. I must have known or been informed of the fact. I should imagine from the clause that is in the agreement, but I understood you to ask if I knew that he was going to sell it when I let him have it.

484 X Q. Now, I will ask you whether any demand was ever made by Mr. Patrick upon you after the 16th of July, 1882, for any money as payment of any portion of the burdens of that contract that was made with Robison and Stebbins.

A. I don't think I saw Mr. Patrick from the time of our settlement until, at the instance of James Patrick, I signed the deed conveying my interest on the 19th of October. It would seem remarkable if he should make any demand after our settlement in June 19 and before my return from the wilderness of Wisconsin to business in St. Louis.

485 X Q. Would it be remarkable that he should ask you to pay some portion of the expense of sinking a shaft that was going steadily from the 19th of June, 1882, until in September, when you would return from the woods?

A. It would after that was his understanding that when we settled up in June, that by my invariable habit of business, on account of my health, I was to be absent until September and did not attend to business.

486 X Q. Was it understood between you and Mr. Patrick that he was to make no demand on you until you came back from your summer vacation in the woods?

A. It was certainly my understanding when I settled in June that I would have no other business affairs until I returned.

487 X Q. Did you expect that you would be entirely exempt from the payment of any debts or claims growing out of the performance of this contract?

A. I made the settlement with Mr. Patrick before leaving,
356 for the express purpose that I did not wish to be annoyed after I had left St. Louis to go there.

488 X Q. Was it understood that Mr. Patrick should carry your interest during the summer while you were off in the woods?

A. My understanding was that I had paid and given a note for that that was to be paid, and, as the work would be let by contract, as I understood it, that the contracts could be met on my return, as far as my portion was concerned.

489 X Q. Did you expect——

A. (Continuing:) And I will say in this connection I had previously carried Mr. Patrick and paid out moneys for him and carr-ed

him for some time, and, he being my partner and I being sick and about to go into the woods, I certainly wouldn't have expected to have had demands made on me, nor do I believe for any honest purpose he would have made such demands if he did.

490 X Q. Now, I will ask you whether, during the time from the 19th of June, 1882, to the 19th of October, 1882, any demand was made by Mr. Patrick upon you for the payment of any moneys or expenses growing out of the working of the Col. Sellers and Accident mines under your contract, or have you paid any.

A. I did not see Mr. Patrick during that period of time that I recollect.

491 X Q. That don't reach my question. Did he make a demand on you in writing?

A. My best recollection is that I saw a letter containing some statement of amounts and what he represented that things were costing or would cost. I have not that letter in my possession, but hope to have power to produce all the letters that relate to this matter, as I said at the commencement of the examination.

492 X Q. Can you give us any information as to when we may expect those letters at this time?

A. I have just been down to confer with Judge Laughlin as to when I may expect to get them, but, as he is absent, I can't say.

357 493 X Q. Did you, after the 16th of July, 1882, make any inquiry of William F. Patrick, either by letter or otherwise, as to the condition of the Col. Sellers shaft and as to what was disclosed in it?

A. I don't think I saw William F. Patrick. I made inquiry particularly of James Patrick, who came to me to get me to convey my interest to his brother.

494 X Q. I asked nothing about James Patrick. Did you make any demand or inquiry by letter of William F. Patrick as to the condition of the mine or as to what the shaft disclosed after the 10th of July, 1882?

A. I did not. I didn't think it necessary to do so, as I supposed he, being there to represent me, would send me information as to how things were.

495 X Q. Did you ever inquire as to the condition of the accounts or expenditures made upon the Col. Sellers after your settlement of the 19th of June, 1882, of William F. Patrick?

A. I made no inquiries until the commencement of this suit, for I supposed that he was reporting to me truthfully at that time all that he knew and a true statement of the accounts.

496 X Q. Did you ever receive or seek any report as to the condition of the accounts of your partnership with William F. Patrick after the 16th of July, 1882?

A. I relied entirely upon Mr. Patrick's statement and his furnishing information in all respects as to the mine.

497 X Q. That don't answer the question. Did you ever receive any reports from Mr. Patrick as to the state of the account of ex-

penses incurred in the sinking of the shaft on the Col. Sellers mine after the 16th of July, 1882?

A. I can't state now from recollection.

498 X Q. Did you ever inquire from Mr. Patrick during that time or after the 16th of July, 1882, as to how the accounts stood?

A. I repeat my answer that I never inquired at any time of Mr. Patrick, as I relied upon him to furnish me full information
358 as to the Col. Sellers and Accident mines.

499 X Q. Did you ever trouble yourself in any way concerning the Col. Sellers mine, the Accident mine, or the Robison contract or your relations to W. F. Patrick after the 19th of June, 1882, except to get your note of $288.70?

A. Yes; I troubled myself before making a conveyance in October to inquire particularly of James Patrick as to whether I had been honestly dealt with and full information furnished me, and I will now repeat that I was assured by him that everything had been told me as to the matter, and I made my deed.

500 X Q. What is meant in the contract of August 28 by the statement that the expense of working the Col. Sellers property under your contract with the owners had been borne principally by said Patrick?

A. As I have already stated, I think it must have referred to some statement which he had forwarded of expenses accruing after the settlement of June 19, for up to that time I had paid in full my amount of obligations under the Stebbins contract.

501 X Q. Did William F. Patrick pay the note of $288.70 that you gave him on the 19th of June, 1882, and was the same after payment delivered to you?

A. I have no recollection as to what became of the note.

502 X Q. Do you know whether or not Mr. Patrick paid it?

A. I have no recollection on the subject.

503 X Q. Did you ever pay it?

A. As I have no recollection, I can only repeat my answer. I have paid so many hundreds of notes and received and given so many notes I can't as a matter of recollection state.

504 X Q. Were you ever called on after the 16th of July, 1882, to pay any of the expenses of sinking the shaft, of working the Col. Sellers property under that contract that you and Patrick obtained from the owners?

359 A. I have no recollection of being called upon after my return that summer to St. Louis, but was called upon to know if I would sell and convey my interest, and done so under the circumstances already stated.

505 X Q. Have you since the 19th of June, 1882, paid anything towards the expense of performing the contract that you and Patrick made with the owners of the Col. Sellers mine?

A. I do not recollect to have done so and presume I did not, as my recollection of the terms under which they bought my interest was that I was to get $288 or a note paid to about that amount and be released from such expenses as had been incurred after June 19.

506 X Q. Now, you say you conveyed your interest in this prop-

erty to W. F. Patrick on the 19th of October, 1882. Was that done by a deed?

A. That is my recollection.

507 X Q. Why did you execute a deed at that time?

A. Because I owned the property until that time.

508 X Q. Did you own the property before you performed your contract?

A. I certainly owned the property, and whatever my debt was to Mr. Patrick I was good for it.

509 X Q. No; I mean were you in a position to convey that property or any interest in it before you and Patrick had performed the contract you made with the owners of the Col. Sellers mine to sink to mineral?

A. I cannot as a witness assume here to give opinions on questions of law.

510 X Q. Didn't the contract provide that you were to receive your deed when you had sunk a shaft to pay mineral?

A. The contract speaks for itself.

511 X Q. Didn't you recite it so in your contract here of the 28th of August, and don't that show to you you have some knowledge on the subject?

A. It does not show that I have now any remembrance as to the terms of the contract.

360 512 X Q. Then, to refresh your memory, I call your attention to a contract written by you on the 28th of August, in which you use this language, referring to the contract with Howard, Glover, Robison, and Stebbins—you use this language: "By the terms of which written contract the said Bowman and Patrick, in consideration of the conveyance to them by said Stebbins and others above named of an undivided one-half right, title, and interest in and to the Col. Sellers and Accident lode mine claims, *and* agree to sink a shaft upon one of said mines to pay mineral or limestone in place." Does not that enable you to remember you were not to get your deed until you had sunk a shaft to pay mineral or limestone in place?

A. No; it don't help me to recall what the contract was. I must have had it in mind; whether I recited it correctly or from memory at the time I drew the paper I don't know; it was much fresher in my mind then than now. I did not have the contract, I am sure, before me when I drew that paper. I probably drew it from the best of my recollection of the contract at that time.

513 X Q. Don't you recollect the deed drawn the same day of your contract with Robison and Stebbins was by the terms of the contract to be left in my possession until you performed your contract?

A. To restate what I stated yesterday, my recollection was there was an arrangement by which the deed was to be left with some one in escrow, to be left in the manner provided in the contract, but the particulars of which I do not remember.

514 X Q. Now, I ask whether this contract was performed on the

19th of October, 1882, when you conveyed by deed your interest to William F. Patrick.

A. I do not wish to pass upon any legal questions, but I will gladly answer as to any facts that existed at that time which may tend to throw any light on the subject which you ask information concerning.

515 X Q. Well, sir, at the time of your conveyance to Mr.
361 Patrick had you and Mr. Patrick sunk a shaft upon the Col. Sellers mine to pay mineral and limestone in place? Do you know that of your own knowledge?

A. I know that Mr. Patrick prior to that time had sunk a shaft to mineral and to paying mineral, but at the time he got me to make the conveyance he was careful to conceal it from me and I did not know it, and I did not find it out or know it until the day I brought this suit; if I had, I would never have made that conveyance.

516 X Q. Do you state positively that prior to the 19th of October, 1882, Mr. Patrick had sunk that shaft to paying mineral?

A. I state, if he can be believed, his own statement can be believed, that he had.

517 X Q. You stated in your former answer that you knew that to be the fact.

A. From statements made by Mr. Patrick and in my previous examination I stated I did not know it from a personal inspection of the mine, because I had not been in Leadville since.

518 X Q. Did Mr. Patrick make those statements to you?

A. Certainly not verbally.

519 X Q. When were those statements made that you refer to?

A. In 1882, prior to my conveyance.

520 X Q. What time in 1882?

A. Between June 19th and October 19th, 1882.

521 X Q. To whom were they made?

A. I have stated fully as to that matter, as you may recall, I think, yesterday, in my examination. Do you wish me to restate?

522 X Q. I wish you to state to whom they were made—that is, a short answer.

A. They were made in communications addressed to different parties by him. I refer to some parties mentioned heretofore—letters to his wife Annie, letters to Jim Patrick, his brother, one
362 of the defendants in this case, and other communications made by him.

523 X Q. Then, if you did not know on the 19th of October, 1882, that your and Patrick's contract with the owners of the Col. Sellers mine had been completed, why did you make a deed?

A. I had not the remotest idea at the time of making the deed that mineral had been found, and I made the deed in that form because I was requested to do so by Mr. Patrick, James Patrick, who came to me from his brother for that purpose. The deed, I think, had been prepared—the original deed—(and which you have referred to and have not produced) in Leadville. I don't think I prepared it; that is my recollection that it was done because Mr.

Patrick desired the conveyance, and I supposed he was familiar with the matter. I signed such conveyance without reflection as to the effect of it, such conveyance as Mr. Patrick presented for my signature—the deed made and presented through his brother James. My best recollection is I did not draw it; if I did I done so by memoranda which they furnished as to how they wished the form of it.

524 X Q. In your conversation with James M. Patrick on the 19th of October, 1882, did he state to you that the Col. Sellers shaft at that time was filled with water, and that they had great difficulty in contending with the water?

A. I think, in connection with his remark that Will. was taking his chances, that he did mention what big chances Will. was taking, and in that connection referred to the great difficulty and expense that he would have to overcome in the matter of water.

525 X Q. Did he say it would require a large expenditure of money to get pumping machinery and place it in the mine?

A. He elaborated upon the dubious condition of affairs, no mineral yet found, and the water likely to prove very troublesome, and that Will. was taking great chances; I do not remember
363 the language in which that particular subject was spoken of.

At this point the further taking of testimony in this cause was adjourned until to-morrow, May 13, 1887.

ST. LOUIS, *May* 13, 1887.

Parties met pursuant to adjournment.

Present as at the last hearing.

The cross-examination of FRANK J. BOWMAN was resumed as follows:

526 X Q. Mr. Bowman, in your examination day before yesterday you said as to some matters that you had recently refreshe- your memory by memoranda and letters which you thought you could produce, and would produce them if possible. Can you state now whether you can produce the memoranda and letters you spoke of then?

A. The package of letters which were with Judge Laughlin I have succeeded to-day in obtaining possession of and am willing to show them to my attorney, who is here present.

527 X Q. Now, about the memoranda that you spoke of?

A. I think I said telegrams and letters and also referred to memoranda that I had made of expenditures of money and things of that kind that had occurred to me as I looked over my papers; that is what I referred to.

528 X Q. Will you now produce all the letters and telegrams by which you stated you were enabled to refresh your memory?

A. Such letters as I have and telegrams I shall be governed by the advice of my counsel as to producing.

The attorney for the plaintiff says that he will produce them if the other side will put them in evidence. If they merely wish to inspect them without putting them in evidence he will not.

364 Counsel for the defendants now requests the witness to produce the letters and memoranda, without which he stated in his cross-examination that he was unable to testify to certain facts, for the purpose of inspecting them and determining whether or not the memoranda he relied on is such memoranda and letters as would refresh his memory upon the matter stated.

Plaintiff's attorney asks the defendants' attorney whether they decline to put those letters they have called for in evidence if produced.

Mr. ELIOT: We will be governed by circumstances when the letters are produced whether we shall introduce them in evidence or not.

Mr. PARSONS: Counsel for the defendants decline to state whether or not on the cross-examination of the witness Bowman they will introduce the letters called for in evidence, but claim the right to inspect them for the purpose of ascertaining whether or not the witness stated truthfully when he said that these letters and memoranda refreshed his memory and enabled him to testify to the facts that he has testified to.

Plaintiff's attorney will waive his right in the premises and will give the letters to the defendants' attorney for inspection, and plaintiff's attorney will put them in evidence as a part of his case.

Plaintiff's counsel now hands to the defendants' counsel a letter of the date of February 16th, 1882, written by William F. Patrick to Frank J. Bowman.

The defendants' counsel reads over the letter of February 16, 1882, and returns it to plaintiff's counsel, with the announcement that he desires to ask no questions as to that letter.

Plaintiff's counsel next hands to the defendants' counsel letter of March 16, 1882, written by William F. Patrick to Frank J. Bowman.

365 Defendants' counsel after reading the same returns the letter of March 16th, 1882, to plaintiff's counsel without any further action.

Plaintiff's attorney hands to defendants' attorney letter of March 18, 1882, written by William F. Patrick to Frank J. Bowman.

Defendants' counsel returns the letter of March, 1882, to plaintiff's counsel.

Plaintiff's counsel now hands the defendants' attorney the letter dated April 1st, 1882, written by William F. Patrick to Frank J. Bowman.

Defendants' counsel reads the letter of April 1st, 1882, written by William F. Patrick to Frank J. Bowman and hands the same back to plaintiff's attorney.

Plaintiff's attorney next hands to the defendants' attorney the letter of April 13, 1882, written by William F. Patrick to Frank J. Bowman.

Defendants' attorney, after reading the same, hands it back to the plaintiff's attorney.

Mr. MCGINNISS: The next one if a letter of May 21, 1882, written

by William F. Patrick to Frank J. Bowman, which was produced to you yesterday and put by you in evidence.

Mr. PARSONS: We don't care to see that.

Plaintiff's counsel next hands to the defendants' counsel a letter dated June 22, 1882, written by William F. Patrick to Frank J. Bowman.

Mr. PARSONS: I wish to ask Mr. Bowman a question about this letter.

529 X Q. In the letter presented to me by your counsel, dated Denver, June 22, 1882, and purporting to have been written by William F. Patrick to you, occurs this language: "In regard
366 to your interest in the Col. Sellers, I think I know a man who will pay the note you gave me $288.69 and take your interest off your hands and let me go right ahead with the work, which I would very much like to do, if you are willing to let it go on those terms, which is the same proposition you made to me in your office. Please telegraph me immediately and I will try and make the arrangements." Now, I will ask you whether your telegram that was introduced in evidence yesterday, dated Ashland, Wisconsin, July 13, 1882, in which this language occurs: "Yours June 22 received yesterday; proposition accepted. Send note. Frank J. Bowman," refers to the proposition contained in the latter and abstract from which I have just read to you?

A. If you wish me to compare the two I will do so and answer your question. The telegram undoubtedly refers to the letter of June 22.

530 X Q. From an examination of that letter, do you recall the fact that you made such a proposition to Mr. Patrick in your office as stated by him in that letter?

A. I have no recollection of making a proposition of the form indicated in this letter, neither do I remember of not doing so. As nothing has come of it, it is not impressed upon my memory.

Letter of June 22 is handed back to plaintiff's counsel.

Plaintiff's attorney hands to the defendants' attorney two telegrams, one a copy of the other, each sent by William F. Patrick to Frank J. Bowman, dated Leadville, Colorado, 15th July, 1882, to Frank J. Bowman; one addressed to him at 8th and Pine streets, St. Louis, and the other addressed to him at Ashland.

531 X Q. I will now ask you whether you received the letter of the 5th referred to in the telegram dated Leadville, Colorado, 15, 1882, from Mr. Patrick to yourself, and which has been just handed to me by your counsel.

A. Do you refer to the following telegram dated Lead-
367 ville, Colorado, July 15, and received northeast corner 3rd and Olive street, St. Louis, 2 a. m., which I suppose is July 16, 1882, addressed to Frank J. Bowman, 8th and Pine street, St. Louis: "Acceptance too late. Proposition was dependent on immediate acceptance in St. Louis. See my letter of 5th. W. F. Patrick;" or do you refer to the telegram dated Leadville, Colorado,

15th, 1882, received at Ashland 16th, to F. J. Bowman: "Acceptance too late. Proposition was dependent on immediate acceptance in St. Louis. See my letter of 5th. W. F. Patrick;" or does your question refer to both telegrams?

532 X Q. My question refers to the two telegrams that I hand to you.

A. And which I have just read?

533 X Q. I decline to answer any questions from you. I said it referred to the telegrams handed to you.

A. If you refer to the telegrams which you handed to me and which I have just read, I will say to you I have no recollection of the fact of receiving the letter of the 5th; but if the United States mails performed their duties, as I have no doubt they did, I must have at some time received it.

534 X Q. Have you a letter dated the 5th of July, 1882, written by William F. Patrick to you, and which is referred to in these telegrams?

A. I have no letter of any description in my possession other than those I have handed to my counsel to-day, so far as I know, and which I believe you have been examining.

535 X Q. Do you know of the existence of any such letter in the possession of anybody?

A. I believe there must be a letter of the 5th, which is there referred to, in existence. A number of letters that I have produced have been furnished me and reported to have been found among my old papers at my former residence as taken possession of by my former wife, and I have reason to believe that all the letters between Mr. Patrick and myself of that date, if a proper search is made by her, can be found. I have here delivered all that I have received thus far from Mr. Laughlin. I have requested that further search be made to find all the letters, if possible.

368

The telegrams referred to are returned to plaintiff's counsel.

Plaintiff's counsel next hands a letter of September 2nd, 1882, written by William F. Patrick to Frank J. Bowman.

536 X Q. In reading the letter just handed to me by your counsel, dated St. Louis, September 2nd, 1882, and addressed to you at the Merchants' hotel, St. Paul, I find the following language:

"I sent you from Leadville an agreement concerning the Col. Sellers, in which I agreed to pay that note $288.70 and you relinquish all rights under the agreement. The shaft is still going down. The note will be due about September 19th, so please sign agreement if you have not already done so and send to me as soon as possible so that I may arrange to take up the note. My address for two or three weeks will be Knoxville, Tennessee.

Yours truly, W. F. PATRICK."

Now, I will ask you whether you received the agreement mentioned by Mr. Patrick in the letter from which I have quoted.

A. I think I did.

537 X Q. What date did you receive it?

A. I think about August 28th.

538 X Q. What was the date of the agreement?

A. I do not know. I never signed the agreement that he sent and I would not sign it.

539 X Q. What has become of that agreement?

A. I can't tell you where it is now. It should be among my old papers, unless it was destroyed.

540 X Q. Then you don't know where it is at the present time?

A. I can't tell you now where it is. I do not know where it is at the present time, but it should be among my papers, un-
369 less it is destroyed. I know I didn't sign it.

541 X Q. Where was it sent to you from?

A. My best recollection is it was sent to me by special messenger up to where I was fishing on the Brule river, my summer place there.

542 X Q. Who was the special messenger, do you know?

A. I have not a recollection who it was unless it might have been Meyers, or it may have been the half-breed Indian Ste.

543 X Q. Was it a special messenger employed by you or Patrick?

A. No; if it was sent by special messenger it was on account of some request being forwarded to the postmaster to have it sent by special messenger to me. I only infer it must have been sent by a special messenger as it reached me out in the woods, which it naturally would not unless there had been some special request to forward it. It is an inference as to the special messenger rather than a remembrance.

544 X Q. Have you made any search for that contract or made any effort to find it or procure it so that you could produce it?

A. I have made the most diligent efforts to obtain all my papers and have been at a great deal of trouble and some expense.

545 X Q. This particular contract?

A. To get all of them; and my instructions were to have all the papers overhauled and given to me; and I can state, that the matter may be better understood, that the correspondence received by me or which reached me while North, fishing, would usually return with my fishing traps and things, directed to my house, and would not be brought to my office and filed with my papers; and it happened for that reason that those papers were left at my former residence, and I have been at a great deal of trouble in seeking to get my papers there to which I have not personal access and cannot have overhauled and delivered to me.

370 546 X Q. Now, I will ask you whether you can remember the date that was expressed in that contract referred to in this letter.

A. My recollection would be that there was no date in it, and I would infer that from the fact that as I would not accept that paper I seem to have drawn one such as I was willing to accept, and this one separated in the formal part descriptively, leaving a blank from the formal part of it and dated at the end. I would infer from that circumstance that such form of contract that was wished I would

15th, 1882, received at Ashland 16th, to F. J. Bowman: "Acceptance too late. Proposition was dependent on immediate acceptance in St. Louis. See my letter of 5th. W. F. Patrick;" or does your question refer to both telegrams?

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The telegrams referred to are returned to plaintiff's counsel.

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Yours truly, W. F. PATRICK."

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544 X Q. Have you made any search for that contract or made any effort to find it or procure it so that you could produce it?

A. I have made the most diligent efforts to obtain all my papers and have been at a great deal of trouble and some expense.

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A. To get all of them; and my instructions were to have all the papers overhauled and given to me; and I can state, that the matter may be better understood, that the correspondence received by me or which reached me while North, fishing, would usually return with my fishing traps and things, directed to my house, and would not be brought to my office and filed with my papers; and it happened for that reason that those papers were left at my former residence, and I have been at a great deal of trouble in seeking to get my papers there to which I have not personal access and cannot have overhauled and delivered to me.

370 546 X Q. Now, I will ask you whether you can remember the date that was expressed in that contract referred to in this letter.

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sign was sent to me without any date inserted in it. That would be an incident that would be to my mind conclusive that I would not sign the one sent and drew one in my own handwriting, and the proposition you have called a contract is a proposition that speaks for itself that I sent to Patrick on the 28th of August.

547 X Q. Then in that contract or paper, whatever you wish to call it, of the date of the 28th of August, 1882, you adopted the formal parts of the contract that Mr. Patrick sent to you?

A. It seems to have adopted, first, the formal descriptive parts, but I drew a different contract, not being willing to accept such a proposition as he had marked for me. That proposition seems to have been made and accepted that I made on August 28 afterwards by Mr. Patrick and a deed made.

The letter last referred to is returned to plaintiff's counsel.

548 X Q. Are the letters that have been produced by your counsel at this examination all the letters that you have been enabled to procure written by William F. Patrick or James M. Patrick up to this date?

A. I handed to my counsel all the letters I procured to-day from Judge Laughlin. Whether we handed them all to you or not I do not know, as a part of the time I was out of the room while you have been inspecting them. I presume he has handed them
371 all to you; so far as I know, he has. What do you say, Mr McGinniss?

Mr. McGINNISS: These are all that I have got that came from Judge Laughlin.

WITNESS: I will say any others he may have were not furnished by me nor from sources under my control.

549 X Q. Were they written to you?

A. So far as I have information, I think not.

550 X Q. Then in your testimony day before yesterday you referred only to the letters that have been produced here to-day by your counsel as being the letters and telegrams upon which you refreshed your memory?

A. I referred to letters and telegrams here produced, as also I then explained; to memorandums in the hunting book as to where I was at certain times, as to memoranda in the cash book, as to what my transactions were, and to memoranda as to dates when I purchased real estate and loaned money for the purpose of refreshing my memory as far as possible in the circumstances of this transaction from various sources; but the letters are those which I presume you have examined as furnished by my counsel.

551 X Q. Can you state definitely when you came out of the woods and went to St. Paul in the month of July, 1882?

A. I think about—I will say, to the best of my recollection, from September 10 to the 11th; it may have been a little later.

552 X Q. You were in St. Paul on the 16th of July?

A. I was in St. Paul on the 16th of July.

553 X Q. Were you there earlier than that?

A. I think not. I think I reached there on the 16th. I was at Ashland on the 16th. I know by reference to the checks that I drew, and my recollection is I went to Madison, perhaps to the land office, and went to St. Paul, and reached there on the 16th; it may have been I reached there on the night of the 15th.

554 X Q. I will ask you whether at the time you say you
372 had this conversation with J. M. Patrick, on the 19th of October, at the time you say you transferred the deed to him, who were present besides you and Mr. Patrick at that conversation.

A. Judge Van Wagoner occupied an office adjoining, but I do not think he was present; he may have been. He was sometimes there when Mr. Patrick and I were there together. Whether he was present and hear- this conversation I do not know. I have not asked him. I don't think any one else was present; no one else that I can remember.

At the request of defendants' counsel plaintiff's counsel produces letter of October 29, 1882, written by William F. Patrick to James M. Patrick.

The letter of October 29, 1882, written by William F. Patrick is read by defendants' counsel and returned.

555 X Q. Mr. Bowman, I will ask you to look at a copy of the letter from W. F. Patrick to you, dated Leadville, July 5, 1882, and state whether or not you ever received the original of that letter.

A. Do you refer to this letter you have handed me in which occurs the words, "I withdraw my offer to return your note for $288.70, dated June 19th, 1882, in case you assigned your interest in the contract to me"?

556 X Q. I refer to the letter that I handed to you.

A. The letter that you handed to me contained the words I have spoken of, and underneath, "Yours truly, W. F. Patrick." I will state that I have no recollection of receiving this letter as a matter of memory. I reply as before, that at some time this letter may have reached me; when, I can't say; it probably reached me some time. My letters came very irregularly. Sometimes I would not get letters until I returned to St. Louis that had been addressed to me in July, as they would be sent up there and kept a length of time, and if they did not reach me, sent here, and I sometimes got them
373 in September when they had been sent early in the season. I presume if some accident did not come to it I received it.

557 X Q. For the purpose of getting it in the record I will read it.

Mr. McGinniss: I object.

558 X Q. I now ask you whether you received a letter from William F. Patrick dated Leadville, July 5, 1882, and addressed to "Mr. Frank J. Bowman, Merchants' hotel, St. Paul, Minnesota. Dear Sir."

Plaintiff's counsel objects, because defendants' counsel has already stated that the paper he is reading purports to be a copy made by

William F. Patrick of a letter. He objects to such copy being put in the record until Mr. Patrick swears it is a true copy and proves that Mr. Bowman received such letter.

559 X Q. And such letter reads as follows:

"I send you a statement of the amounts paid on the Col. Sellers contract since our settlement, from which you will see that the amount due from you thereon was $952.32, for which amount I will draw on you to-morrow. I wish to notify you and hereby do so, that if the draft is not paid, that I will apply to Stebbins and Robison and the other partners for a new contract in my own name. I have consulted an attorney here, and am satisfied that we are obliged to continue the work in order to comply with our contract, and that your plan of doing a little work every ten days would not be acting according to its letter and spirit and would cause a forfeiture of the contract and lose all the money we have spent in sinking the first hundred feet. That same attorney also tells me that under our contract, if you do not pay your proportion when called upon you forfeit your rights under said contract. I want to deal fairly with you, and will tell you that in my opinion, the
374 shaft which is now 165 feet deep is looking very promising, and I think that we are not very far from the contact. My reasons for thinking so, are that the porphyry is now heavily iron-stained. I hope you will pay the draft and that we may continue work together; but if you do not, I will have to protect myself, and will do so by taking a new contract as I have stated. I withdraw my offer to return your note for $288.70 dated June 19th, 1882 in case you assigned your interest in the contract to me.

Yours truly, W. F. PATRICK."

Now, the question is whether you received such a letter.

A. You have been reading from what purports to be a copy of a letter made in the handwriting of W. F. Patrick for the purpose, as you have stated, of getting it into the record. Whatever the purpose may be, I cannot change my answer, as my recollection is the same—it was a few moments ago. I do not remember to have received this letter, although I might have done so, but it would seem highly improbable that Mr. Patrick would write such a letter at that time unless for some purpose of trickery or chicanery, for the reason that we had settled our accounts only about two weeks before, and he then understood that I was hastening up into the woods to remain for some time. Our average expenses for the three months on our mine sinking the shaft had been less than $500; my share about $250. It would seem, therefore, highly improbable that in two weeks after making settlement, and knowing I was going in the woods, that for any honest purpose he would concoct such a letter. I have not a recollection of it, and yet he may have sent it. I don't know what Patrick would do. I only speak as to the facts known to me, which would preclude me from inferring that Mr. Patrick would send such a letter; and also it would not impress itself upon me, even if he wrote that some attorney had told him

that our contract would be forfeited on his declaration. As
375 I well knew at that time the terms of our contract, I should not have been impressed by any such statement.

Counsel for the defendants desires to state that the purpose for reading the letter was to refresh the memory of the witness so that he could answer the question as to whether or not he had received a letter of that description, dated the 5th of July, 1882, and for the further reason that the witness, instead of answering the question propounded to him when the letter was submitted to him, attempted to inject into the record an extract from the letter instead of reading the whole letter. Counsel for the defendants further objects to the statement of the witness as to the purpose or motive of Mr. Patrick in drawing on him for expenses and writing him the letter of the 5th of July, as stated in the last answer of the witness. Now, I desire to ask the witness——

The WITNESS: I wish by way of explanation to say I referred to these matters for the purpose of explaining why the letter wasn't impressed upon my mind and the reasons that I would not likely recall it, and I wish to state if such letter was received by me at all that it is in the place I have indicated with my papers.

560 X Q. Now, Mr. Bowman, you have stated that it would be improbable that any expenses should have accrued after the 19th of June, 1882, which would authorize Mr. Patrick to draw on you for the amount named in the letter. Do you not know that aside from the contract for sinking that shaft in the mine that the expense of guarding the mine against "jumpers" and the expense of applying for patents, which was a part of your contract with the owners of the Col. Sellers and Accident, the purchase of machinery and the employment of blacksmiths and the cost of surveying the property and the expense of lumber and various other expenses, hardware, etc., were incurred by Mr. Patrick, and necessarily
376 incurred, in addition to the expense of sinking a shaft on the claim, attorneys' fees, etc.?

A. I have no knowledge of such facts as you mention, but have knowledge to the effect that while work was being pushed for the three months prior to June 19th the total expenditures were something less than $1,500, and, further, as to the expenses since that time I have no personal knowledge.

561 X Q. Now, I desire to ask you what other parties, if any, are interested with you in this suit.

A. No parties are interested with me in any ownership of any portion of the property for which I have brought suit other than my attorney, who is interested to win the suit.

562 X Q. Are any parties interested in the recovery of the profits of the interest that you seek to recover?

A. None other than my attorney and myself. I have no contracts with any persons whomsoever concerning the subject-matter of this suit, except with Mr. E. McGinniss, my counsel. I have a contract with him as to the amount of fees that I will pay him, and the amount that I am to pay will be less or more in proportion to the

value of the property that I expect to recover; to that extent he may be said to be interested. I have no contracts with any other parties. Mr. McDonald was formerly employed, but his contract was terminated by notice for sufficient reasons.

563 X Q. Has Mr. William V. Wolcott any interest in this suit or in the event of this suit?

A. Not so far as known to me. He may have some feeling about the matter. I have no knowledge as to that, but I have no contract with him of any kind or description.

564 X Q. Have you made any sale of any portion of the interest you expect to recover in this suit?

A. I answer again: I have not at this time disposed of any portion of it except my contract with Mr. McGinniss, which is in a portion of the property, and simply his fees, to be regulated
377 to a certain extent on the amount that may be recovered.

565 X Q. Did you have a contract with Mr. Wolcott by which you assigned or agreed to assign to Mr. Wolcott any interest in this suit?

A. I have never assigned nor agreed to assign any interest in this suit, so far as I have knowledge, and I ought to know.

566 X Q. I will ask you whether since this suit was commenced you have made a sale of any portion of the interest which you expect to recover in this suit or of the proceeds of ores sold with W. V. Wolcott and whether Wolcott has paid you the sum of $1,500 for that interest or for some interest, $1,000 being paid in money and $500 in a note.

A. I have never transferred any portion of my interest to Mr. W. V. Wolcott at any time since the commencement of this suit.

567 X Q. Have you made any arrangement with him for any interest in any event?

A. No arrangement with him for any interest in any event; no arrangement with any person concerning the recovery of any amount in this suit except with Mr. E. McGinniss, my counsel, and that is no further than I have stated. His fee may be in proportion to the amount recovered. In the transfer of any portion of the interest simply his fee to be regulated. He will charge me less if I recover a small amount than if I recover a large one. That is the only contract I have.

568 X Q. Have you any agreement by which any portion of your interest or claimed interest either in the property, the subject-matter of this suit, or in the product of the mine is to be transferred or sold or assigned or has been sold or assigned to T. Ward McManus?

A. I never made any contract with T. Ward McManus or assignment to him of any interest or of the proceeds in this property in litigation since the commencement of this suit.

569 X Q. I will ask you whether either Mr. Wolcott or
378 Mr. McManus paid you the sum of $1,500, $1,000 of which was paid in money and $500 in a note which was afterwards discounted at the Third National bank and which was the consideration for any interest in the subject-matter of this suit.

A. I have never conveyed in any manner or form to Mr. Mc-

Manus or to Mr. Wolcott any interest in this property or in the subject-matter of this suit, nor have they paid me, either of them, any money for such purpose.

570 X Q. Did either of them ever pay or did you ever collect from either of them any portion of the $50 deposited by you as security for costs in this case?

A. I have not. I will now state for your information what you have not asked, and am willing to do so, that when Mr. Price was employed by me as attorney in this matter that I received from him some money that I wished to use, amounting to about $1,500. I think he raised a portion of that by means—he had a note of Wolcott's—he was attorney for Wolcott, and I presume they helped him raise the money, and I learned that Price was not an attorney in the United States court and I concluded to dispense with his services. I had given him a contract after the commencement of the suit, which was to cover any services he might render, and also the repayment to him of the $1,500, and when I concluded not to retain him in the case because he was not an attorney there I thought it better to have other counsel, and that contract was torn up and concelled and destroyed between Price and myself, and that is the only transaction, probably, to which you have been directing your attention, and I voluntarily give you this explanation so that you may be at rest concerning the matter.

Redirect examination by Mr. McGINNISS:

379 83 Q. I now put into your hands a letter dated Knoxville, December 23, 1881, addressed "Dear brother" and signed with the initials "W. F. P.," and ask you to look at that and tell me if you know in whose handwriting that letter is.

A. That is in the handwriting of William F. Patrick, one of the defendants in this case.

COUNSEL: I will now read this letter in evidence.

Counsel for the defendants object to the introduction of this letter for the reason that it is not a proper re-examination of the witness and it is a matter that ought to have been introduced in the examination-in-chief.

Mr. McGINNISS: I am not questioning the witness about these letters; I am simply proving the signatures.

Mr. PARSONS: I object, further, that the letter purports to be of a date long prior to any negotiations between the plaintiffs and the defendants and prior to the time that any false representations or fraud or false pretenses were charged in the complaint to have been made.

Mr. McGINNISS: We offer it for a different purpose entirely.

The letter, dated "Knoxville, December 23, 1881," was then read in evidence as follows:

KNOXVILLE, *Dec.* 23, 1881.

DEAR BROTHER: When I left home one week ago to-day, I understood from May that Mrs. McM. had received a letter from Fannie

the day before, saying that you and she could not leave Chirland till to-morrow, so I did not hurry myself from Washington, where we were having a good time and also attending to a little business. I wanted to see you however in regard to the St. Louis, and what I wanted was this, I think that Mr. Bowman is somewhat anxious to have a larger interest than he now possesses and think he would be willing to buy an $\frac{1}{8}$ as a speculation and what I wished you to do was to see him and without exhibiting any axiety to do so,
380 try to sell him that interest.

I would start the price at about $15,000 to $18,000, but I think if you can get $10,000 in cash it will be a mighty good sale. That will leave us a clear title to $\frac{2}{8}$ and a possibility of getting back the $\frac{1}{8}$ sold to Chase in '78. My reason for thinking that amount a good — for the property, I could give you more fully in person, but briefly they are, that Blow who was surveyer for the Colo. Prince at the time they were working and who was frequently in the mine and all through it says that at no time did he ever see any well-defined body of ore, and the fact that they have not done any work for so many months rather confirms me in that belief. Blow says that in his judgment $15,000 would be a large price for our $\frac{3}{8}$.

Another reason for my belief is that the costs for the suit which amounted to only $538 were not paid till one day after the time set by the court; and a more convincing one is the fact that the miners at work in the Miner Voy at the time of my visit there had not been paid for three months, which certainly does not indicate a very healthy state of the mine. Mr. McKenzie and I while at the mine selected from a large pile of ore in the shaft-house two pieces of ore that we considered the best we could get. I had Fred. Bruce crush and assay them together, and the result was 7 ozs. silver and $\frac{3}{10}$ oz. gold to the ton. We may have been mistaken in making our selection, but I don't think we were. For all these reasons I think it advisable to try Bowman and I think it better for you to do so than for myself, as you could represent to him that you are in need of money, and we can divide up afterward if you get it. I suppose Eddie has secured the deed from him for the $\frac{1}{8}$ I deeded him in Denver, if not get it in your own name, but don't put it on record.

Also get from him and send me the amount due me which is $45 or $50. I wish you would see Jewett as soon as possible
381 and ask him how I had best go to work to try and secure the assay office in Denver. While in Washington I made some inquiries about it and think there may be something in it. Ask him to write and let me know through whom the appointment comes, and in fact all about it. I will write to Morgan at Denver about it to-day. Please have J. do this as soon as possible.

With love to Fannie, I am your bro.

W. F. P.

Have forgotten the Lucas Ave. number, so will send this home.

Paper referred to is marked Plaintiff's Exhibit No. 1.

Counsel for the defendants objected to the letter just read and introduced in evidence and move that the same be stricken from the record as being impertinent, irrelevant, and wholly incompetent.

84 Q. I now show you a letter dated "Leadville, December 25, 1882," addressed "Dear brother," and signed "Your brother, W. F. P.," and ask you if you know in whose handwriting that is.

A. That is in the handwriting of William F. Patrick, one of the defendants in this case.

Paper referred to offered in evidence and marked Plaintiff's Exhibit No. 2 and is as follows:

"LEADVILLE, *Dec.* 25, 1882.

DEAR BROTHER: Yours of Dec. 21 received yesterday. I think your plan a good one in regard to the stock. Except that you should remit me $2,500 less $120 interest toward, and the discount on the note at 4th Nat'l.

However, if you would rather pay your proportion by a note, you can make one to my order, and send it to me, and I will indorse it and get you to discount it in St. Louis, and will credit you with the proceeds. That will carry out your arrangement with 382 Bowman.

We have had a very quiet Christmas. Have received no presents. We were to take dinner with the Bissells, but Mrs. B. took sick so we had a quiet dinner at home. Work is progressing nicely at the Sellers.

I must close now in order to get this in the mail.

Happy new year to all.

Your brother, W. F. P."

85 Q. I next show to you a letter dated "Leadville, Colo., March 12, 1882," and addressed "Dear brother," and signed, "Your brother, W. F. P.," and ask you if you know in whose handwriting that is.

A. It is in the handwriting of William F. Patrick, one of the defendants in this case.

Paper referred to is offered in evidence and marked Plaintiff's Exhibit No. 3 and is as follows:

"LEADVILLE, COLO., *March* 12, 1882.

DEAR BROTHER: I have received two letters from you, but have neglected writing as I have been away some, and then Annie now does the writing for both of us. I have not got started in the shaft you speak of yet, but hope to do so soon. Bowman or his clerk neglected to forward the contract promptly, so it has not come back here yet. If you could get Ward to sink the shaft for us for ¼ and pay all expenses we would give you an interest. Otherwise it would divide the thing up too much. The cost of the shaft will not be less than $5000, and if we are so unfortunate as to get much water, it will exceed that figure. I think it is a good venture, but it is a venture and should be so regarded.

If we get any ore there, we are almost sure of a big body, and a mine worth at least $100,000. The A. Y. mine adjoining this property is shipping 80 or 90 tons per day and I am told is clear-
383 ing about $20,000 to $25,000 pr. month.

We go to housekeeping this week. Our address will be 130 W. 6th St. Send letters there as we have carriers. Please tell Eddie to send my student lamp by express. We have a nicely furnished house and expect to be very comfortable.

Love to Fannie.

Your bro. W. F. P."

Mr. PARSONS: I object to that letter for the reason that the letter shows that it was written long before any fraud, concealment, misrepresentations, or false pretense alleged by the plaintiff to have been practiced on him, as charged in the complaint.

86 Q. I next show you a letter dated "Leadville, July 5th, 1882," addressed "Dear brother" and signed "Your brother, W. F. Patrick," and will ask you if you know in whose handwriting that letter is.

A. That is in the handwriting of William F. Patrick, one of the defendants in this case.

Paper referred to is offered in evidence and marked Plaintiff's Exhibit No. 4 and is as follows:

130 W. 6TH ST.,
LEADVILLE, *July 5th*, 1882.

DEAR BROTHER: I reached here about a week ago, after going across the range with Mr. Guy, who went to examine a new strike there for some St. Louis people. He got an option on it for two weeks and wanted me to go over and take charge of it in case they decided to take it, but I suppose they have decided to let it go, as I have heard nothing from them yet, and their time expires on Saturday.

384 On the second trial of the St. Louis *vs.* Colorado Prince the St. Louis won the case as there was no attorney present to represent the St. L.

I saw Zable in the court-room and he told me that Flinn was expected in Denver the next day, but I suppose he feels so rich since we won that suit that he will do nothing in regard to the consolidation as I have heard nothing from Patterson since coming up here, and he promised to write to us as soon as he succeeded in doing anything with Flinn. Howell is not back yet, so the matter remains as it was with no better prospect of getting anything out of the St. L.

The shaft in the Col. Sellers is looking very promising for several feet the porphyry has been heavily iron-stained and I have good reasons for thinking that we are near the contact. Acting on Col. Bissell's advice, I to-day wrote to Bowman telling him that if he did not pay up I would apply to the owners of the ground for a new contract in my own name, and leave him out. I don't suppose he will pay, but I will let you into the new one on the same terms you are in the old. We had a very quiet Fourth here. Two

men killed, one accidentally by the bursting of a cannon, one murdered, and another shot in the arm, and a big fire at night. Annie and I remained at home all day, and spent the evening at Bissell's playing whist.

— left for Rico on Monday. We hope Fannie is better. Annie sends her love.

Your brother, W. F. PATRICK.

87 Q. I show you a letter dated "Knoxville, Tennessee, August 24, 1882," addressed "Dear son," and signed "Your father, W. Patrick," and will ask you if you know in whose handwriting that letter is.

A. I think that is the handwriting of our old city treasurer—I should identify it as such—William Patrick.

385 88 Q. What relation to William and James is he?

A. I have heard him spoken of as their father; I don't know.

Paper referred to is offered in evidence and marked Plaintiff's Exhibit No. 5.

Mr. PARSONS: I object to this letter as incompetent, irrelevant, and impertinent.

The letter was then read as follows:

Office of Knoxville Marble Company.

KNOXVILLE, TENN., *Aug. 24th*, 1882.

DEAR SIR, SON, Your letter of the 19th only reached me yesterday. Which we were glad to receive and hear that you and Fannie are both well. If you should find any of the blocks that I measured are worthless, strike them off the list. You can send me your due bill for the balance on this day week. I went into Knoxville to see Ross, but he and family were just going to Tate Springs, so I had no good chance to talk to him. I will do so the first time I get to town. Eddie has gone to town this morning, hoping to find the buckboard there. We have no good way of getting to town unless we go horseback, which is too much for me, as I have not been very well for some days. My side pains trouble me. When I see Ross, I will do the best I can for you.

The first car-load you had better ship to Bradley, and when you get a nice load of say five blocks making 160 or 170 feet ship to Torreys & Co. Boston. You need not write to them first as I talked to them about it when I was in Boston. Have Howe to drill and quarry in the largest place to get out good blocks.

Annie was up to see us on Tuesday. She had just got a letter from William; he writes her the mine is all right. He is now going through a bed of mineral that pays and hopes to strike car-

386 bonate soon and is resolved not to sell, but hold onto the mine. You must not write anything to St. Louis about it as William has not got Bowman's deed yet; only has a written prom-

ise for it; if you have written to any person caution them to say nothing about it. Ma, the girls and Eddie are all well.

Your father, W. F. PATRICK.

89 Q. I next show you a letter dated "Leadville, October 29, 1882," addressed "Dear brother," apparently without signature, and ask you if you know in whose handwriting that is.

A. This is a letter in the handwriting of William F. Patrick, one of the defendants in this case.

Paper referred to is offered in evidence and marked Plaintiff's Exhibit No. 6, and is as follows:

LEADVILLE, *Oct.* 29, 1882.

DEAR BROTHER: Your telegram was received this morning. I am not quite sure that I understand, but think you want to know if it would be safe to bet that I will get $8,000.00 out of the Sellers and Accident in one year. I think it best to answer by mail so I can explain things. At present the Sellers is shut down as there is more water than we are able to handle, but we are looking around for a pump and hope to get one that will answer our purpose here. We have a bid from Fraser and Chalmers of Chicago for a plant for a 10″ Cornish pump f. o. b. at Chicago for $7,000 and in addition to that the cost of freight and putting the machinery in place would be $7,000 or $8,000 more, making total cost $15,000. I think however that we can get what machinery we will need for the present right here at a cost of say $5,000, that will answer our purpose till we can get down and see what we have. In case we can
387 get the pump working soon I don't think there is any question but that we can take $8,000 or $80,000 out within a year. The stuff that was taken out of the shaft after I left here is in the ore-house and looks well.

There is another hindrance we may have however, and that is that if we get everything in good shape and start to shipping the — may enjoin us and put a temporary stop on our production. I have been offered since I came back $3,000 for $\frac{1}{16}$ interest; at that rate our combined interest is worth now $21,000, so we could get $8,000 and more out in that way, which would cover the bet I suppose. Morgan says there are several parties in Denver in the chattel-mortgage business and he does not think there is money enough in it to induce any one else to go into it. He says he used to do some of it himself, but has given it up.

By the way, you might as- some of the machinery men in St. L. what they would furnish a plant for a 10″ Cornish pump per f. o. b. in St. L. Pump to be put in a shaft 300 ft. deep, and let me know.

I drew on you yesterday, 1 day's sight for $1,000 which you will please attend to; you will find the draft at the Bank of Commerce.

Mr. PARSONS: I object to this letter as incompetent and irrelevant.

90 Q. I now show you a letter of date "Knoxville, April 10, 1884," addressed "Dear brother" and signed "Your brother, W. F. Patrick," and will ask in whose handwriting that is.

A. That is in the handwriting of William F. Patrick, one of the defendants in this suit.

Paper referred to was offered in evidence and marked Plaintiff's Exhibit No. 7, and is as follows:

"KNOXVILLE, *April* 10, 1884.

388 DEAR BROTHER: I received a letter from Leadville to-day saying that they had made a dividend of $16,000 and so send you my check for your share of the amount $1,333.35. I suppose you will have to deposit it for collection as all the banks must be a little shy of Leadville banks now. I have been expecting you up, if you do not come, I will come down on Monday and stay one day.

I am in a hurry to get back and will leave here for Colorado on Wednesday or Thursday.

Your bro., W. F. PATRICK."

91 Q. I now show you a letter dated "Leadville, Colorado, August 6, 1884," and addressed "My dear brother," and signed "W. F. P.," and will ask you if you know in whose handwriting it is.

A. That is in the handwriting of W. F. Patrick, one of the defendants in this suit.

Paper referred to is offered in evidence and marked Plaintiff's Exhibit No. 8, and is as follows:

"LEADVILLE, COLO., *Aug.* 6, 1884.

MY DEAR BROTHER: Your telegram received this morning; am glad to hear that pa is better; hope he will continue to improve rapidly. I send you enclosed a draft for $1,666.65, your share of div. No. 12 of $20,000 made yesterday.

If you can, I wish you would pay pa something on account of that old mill business. I have paid him $1,000 on that account, and I guess he needs the money,

The mine is looking well, and, as you see, doing well.

Love to all.

W. F. P.

(Endorsement on bank:) Have to direct to Strattman's as I have forgotten the No. of the house on Lucas Ave."

92 Q. I next show you a letter dated "Leadville, October
389 4, 1884," addressed "Dear brother" and signed "W. F. P.," and ask if you know in whose handwriting it is.

A. That is in the handwriting of William F. Patrick, one of the defendants in this case.

Paper referred to is offered in evidence and marked Plaintiff's Exhibit No. 9 and is as follows:

LEADVILLE, *Oct.* 4, 1884.

DEAR BROTHER: I send you inclosed a draft for $1,832.35 which is your share of div. No. 14, which was $22,000 made to-day.

This is the Sept. div. But was delayed a little owing to the slowness of some of the smelters in sampling.

I think from present prospects the Oct. div. will be nearly as large.

Now that you are at home I wish you would settle with pa in regard to the amount due on that old mill business. You got the money and can make the settlement better than I can. He has an idea from the fact that he has my note for $8,000.00 that that is the amount due. I am confident however that it is not nearly as much. My note was given at the time I executed a deed of trust to him on my interest in the aftermath and was given to cover up that interest and prevent the creditors of the mill from jumping onto it and busting me. The deed of trust was released by pa in '79 or '80. I have paid pa $1,500 on account of that old business and I wish you would pay an equal amount and agree with him in regard to a settlement. Warner came in and staid a few days, but left Tuesday morning for San Juan and will probably be gone about one month.

Love to all,

Your brother, W. F. P.

93 Q. I next show you a letter dated "Leadville, Colorado,
390 February 25, 1885," addressed "Dear brother" and signed "W. F. P.," and will ask you if you know in whose handwriting that is.

A. That is in the handwriting of William F. Patrick, one of the defendants in this case.

Paper referred to is offered in evidence and marked Plaintiff's Exhibit No. 10, and is as follows:

"Office Col. Sellers mine, corner Harrison avenue and Fifth street, rooms 1 and 2.

P. O. box 585.

LEADVILLE, COLORADO, *Feb'y* 25, 1885.

DEAR BROTHER: Inclosed please find draft for $1,000.00 your share div. No. 17, of $12,000 made to-day. I received your telegram but did not answer it as I expected every day to make a dividend, and send the money, but we have been delayed by the bad weather.

All well; hope F. is much better now.

Your bro. W. F. P."

Mr. PARSONS: I object to this letter as incompetent and irrelevant.

94 Q. I next show you a letter dated "July 7, 1885, Leadville, Colorado," and addressed "Dear brother," and signed "W. F. P.," and will ask you if you know in whose handwriting that is.

A. That is in the handwriting of William F. Patrick, one of the defendants in this suit.

Paper referred to was offered in evidence and marked Plaintiff's Exhibit No. 11.

Mr. PARSONS: I object to this letter as incompetent and irrelevant.

The letter was read as follows:

Office Col. Sellers mine, corner Harrison and Fifth street, rooms 1 and 2.
P. O. box 585.

391 LEADVILLE, COLORADO, *July* 7, 1885.

DEAR BROTHER: Yours of recent date received. I send you inclosed a draft for $1,066.65 less exchange in payment of your share of div. No. 21, of $12,800 made yesterday. I think your decision in regard to Las Vegas is a very good one. From what I have heard of it, I think the climate is more even than that of any place in Colo. and the altitude is considerably less. I hope the change will prove very beneficial to F.

Annie has not been very well this spring and summer but she is having a very quiet summer free from company and I think will improve rapidly.

Love to all,
Your bro. W. F. P.

95 Q. I now show you a letter dated "Leadville, Colorado, December 15, 1884," addressed "Dear brother" and signed "W. F. Patrick," and ask in whose handwriting that is, if you know.

A. That is in the handwriting of William F. Patrick, one of the defendants in this suit.

Paper referred to is offered in evidence and marked Plaintiff's Exhibit No. 12.

Mr. PARSONS: I object to that as incompetent and irrelevant.

The letter was read as follows:

Office Col. Sellers mine, corner Harrison and Fifth street, rooms 1 and 2.
P. O. box 585.

LEADVILLE, COLO., *Dec.* 15, 1884.

DEAR BROTHER: I returned from Chicago and St. L. a couple of days ago. I went there, Chicago, to commence negotiations
392 with some parties who want to place our mine in England. I saw the men and was much pleased with their appearance and with the reports I had of their business standing from Chicago people. I made a contract with them for six months from to-day giving them an option to purchase the mine at any time during the term of the contract for the sum of $1,350,000 which if the sale goes through will give you $112,500. They have sent one expert here, who has examined the mine and is thoroughly satisfied with it. One of the gentlemen I saw in Chicago is a Scotchman who however has spent a great deal of his time in this country. He has authority from a number of English capitalists to hunt up

American investments for them and has already gotten them into a number of things. He will go to England himself about Feb'y 1st, and devote himself to pushing our scheme as rapidly as possible. He says he could not accomplish anything by going sooner as those fellows there will not be over the holidays much before that time.

In case a sale is made, the money is to be deposited in the 1st Nat'l Bank of Chicago. That is the strongest bank there with $3,000,000 capital.

All the other owners are very much pleased with what has been done so far and if we can make it go it will be a splendid thing for us all. I wish you would keep the matter just as quiet as you possibly can, and expecially don't let the folks at home know about it, as you know how ma feels about selling anything and we would not have any peace until the matter was decided definitely one way or the other. If we can make the trade the money will be worth a great deal more to us than our interests in the mine. It will give us both all we will ever need to live. My only fear in regard to the sale is
that we had placed the price too high.

393 In my opinion the mine is not worth the amount we ask for it, and I am very much afraid that when the English expert comes over he will report adversely. Fred. Bruen and I figured on the value of the mine several times and we could not get it above $700,000 and that is more than we can take out of it ourselves. I will work the mine slowly for the next six months and have it in as good shape as possible for examination.

After staying four days in Chicago we, that is Annie, Lucille and I went to St. L.; we stayed there two days, last Monday and Tuesday at the Southern; on Tuesday we got a team and took May and Clara alonf and went out and spent the day with the folks. We found them all well and in the midst of hog-killing. Everything looked very nice about the place. Pa said he would have to pay his taxes this month, and was badly in need of money, so I told him I would send him $1,000, $500 from each of us. Your $500 comes from your share of dividend No. 16 of $8,000 just made your share being $666.65 so I enclose a draft to your order for the difference $166.65. I hope this arrangement will be satisfactory to you. I told the folks that I had gone to Chicago to investigate the merits of a new smelting process and they know nothing about the projected sale.

My story was partially true as I did incidentally look in a schame that some Chicago people are working up for a new smelter, but I soon satisfied myself that there was not much in it. They are however building works on their new plan and when they get to running I may go on and look at them. Got a letter from Warner the other day from the ranch; he will be here about New Year's. I left Annie and Lucille in Denver at Gov. Grant's. Annie has not been at all well for several months. The altitude is too much for her, that is the reason I took her with me on the trip to Chicago.
Her heart seems to be affected but she will not let a
394 physician examine her. They will come home on Friday.

Love to all.

Your brother. W. F. PATRICK.

96 Q. I now show you a letter dated "Leadville, Colorado, February 16, 1882," and addressed to "Frank J. Bowman" and signed "W. F. Patrick," and ask in whose handwriting it is, if you know.

A. That is the handwriting of William F. Patrick and was received by me in due course of mail.

97 Q. Paper referred to was offered in evidence and marked Plaintiff's Exhibit No. 13.

Mr. PARSONS: I object to that letter as incompetent and irrelevant.

The letter was read as follows:

The Clarendon hotel. Howard C. Chapin, prop'r.

LEADVILLE, COLO., *Feb'y* 16, 1882.

Mr. Frank J. Bowman.

DEAR SIR. I arrived here yesterday morning, and just after breakfast Maj. Wilken and I went to the Green Mt. Boy and examined it thoroughly. We found it as represented and I so telegraphed you last night. The workings are like the sketch.

The shaft is about 170 feet deep at about 60 feet from the surface; the (y) have run a drift as I have shown. They struck the small vein, which is only from 5 to 8 inches wide, but contains very rich ore as you will see by the inclosed assay certificate. They then went through about 20 feet of decomposed quartz. I took a sample of it and had it fanned and got a number of colors of gold. I think it would pay to stamp. They then struck the large vein and sunk a winze on it. Where the- first struck it it was only about 18
395 inches wide, but it rapidly widened out, and at the bottom of the winze it is fully six feet wide. I took a large sample from various places in the vein and mixed it well, and the assay was, as the certificate shows, 4.45 ozs. in gold and 6½ ozs. in silver to the ton. The value of the gold would be $89.00 pr. ton. I don't count the silver, as it could not be saved in the stamping process. I think the ore could be taken from the mine and stamped at a cost of not over $12.00 per ton. The ore in the small vein is worth $1,586.00 per ton, not including the silver, but the vein is so small that the cost of mining would be considerably more than the large vein. They have about 50 tons of ore in the shaft-house, which they claim will run $200 per ton, and I think it very likely it will do so, as it has been sorted somewhat, whereas the sample I took was intended to be a general average of all the run, and it assayed $89 per ton.

They are now at work on drift No. 2, and are within a few feet of the small rim if it retains its position, but I think it probable that it joins the big one. When the- reach the large one there will be a large amount of ore above them that they can get out easily.

The 20 feet of quartz between the veins will, I think, pay well under the stamps.

I think the ¼ is fully worth the price asked for it—$25,000, and when they get the drift No. 2 it —, and if they get the same body of

ore—as I have no doubt they will—it will be worth a great deal more than that.

We rode over the placer and examined it and made some inquiries about it and am satisfied it is a good thing, especially at the price Maj. Wilson thinks it can be got at—$30,000. I feel sure that you cannot lose money by taking it at that figure.

396 I will close the contract on the property in Cal. gulch to-day and let a contract to sink the shaft 100 feet as soon as I can get a good man to take it. Please send check for $500 so I can have funds to make the payments as they become due. Will send copy of contract to-morrow.

Yours truly, W. F. PATRICK.

97 Q. The next letter is dated "Leadville, Colorado, March 16, 1882," and addressed to "F. J. Bowman" and signed "W. F. Patrick." I will ask if you know in whose handwriting that is.

A. That is in the handwriting of William F. Patrick, one of the defendants in this case, and was received by me in due course of mail.

Paper referred to was offered in evidence and marked Plaintiff's Exhibit No. 14 and is as follows:

LEADVILLE, *March* 16, 1882.

Mr. F. J. Bowman, St. Louis, Mo.

DEAR SIR: The agreement in regard to the Col. Sellers and Accident claims arrived this morning. I have left it with the county clerk for record. It was signed and properly acknowledged by all parties. I took a receipt for the deed from the party who holds it in escrow.

I have let a contract for 100 ft. of a shaft and will get the work started this week. Please send check for $500 in a short time as I will want to make payments each week. I will reserve about 20 per cent. of the contract price till the work is completed.

Yours truly, W. F. PATRICK.

MR. PARSONS: I object to that letter as incompetent and irrelevant.

397 98 Q. I now show you a letter dated "March 18, 1882," addressed "Frank J. Bowman" and signed "W. F. Patrick," and ask in whose handwriting that is, if you know.

A. That is in the handwriting of William F. Patrick, one of the defendants in this suit, and was received by me in due course of mail.

Paper referred to was offered in evidence and marked Plaintiff's Exhibit No. 15 and is as follows:

130 WEST 6TH ST., LEADVILLE, *M'ch* 18, 1882.

Mr. Frank J. Bowman, St. Louis, Mo.

DEAR SIR: Your favor of March 14 was received to-day inclosing letters in regard to the Colo. Prince. There is nothing new here in

regard to that matter. I met Mr. Thomas yesterday; he thinks the attorney for the Miner Boy Co. has not found out about our default judgment yet, and as April 1st is now so close, I am in hopes that he will not discover it till it is too late to do anything. I let a contract on the Col. Sellers this morning. The contractor does the work for $10.00 pr. foot and we furnish the material for the timber which will cost us in the neighborhood of $350. He got started on the shaft this afternoon. I am to pay him at the completion of each 25 feet reserving 15, as a forfeit if the work is not completed according to contract.

If we strike a body of water his contract is terminated, and that is the only limitation expressed in it. I will send you the contract and the holders receipt for the deed as soon as I get the contract from the county recorder's office where it now is.

I think we are sure to make a good amount off of that venture.

398 Yours truly, W. F. PATRICK.

99 Q. I now show you a letter dated "Leadville, April 1st, 1882," and addressed "F. J. Bowman" and signed "W. F. Patrick," and ask in whose handwriting that is, if you know.

A. That is in the handwriting of William F. Patrick, one of the defendants in this case, and was received by me in due course of mail.

Paper referred to was offered in evidence and marked Plaintiff's Exhibit No. 16.

Mr. PARSONS: I object to that as incompetent and irrelevant.

The letter was read as follows:

130 W. 6TH ST., LEADVILLE, *April 1st*, 1882.

Mr. F. J. Bowman, St. Louis, Mo.

DEAR SIR: I send you a copy of our contract on the Col. Sellers and Accident, also Parcons' receipt for the deed. You can put the receipt in your safe. I took a surveyor up and run the line of the Minnie, and started the shaft about 30 feet from the line so as to be as near the A. Y. mine as possible. My agreement with the contractors is to pay them every 25 feet The amount is $10 per foot and we to pay for the timbers which will cost us about $350 more for the 100 feet making the total cost about $1,350.00 for the 1st 100 ft.

The payment on the 1st 25 feet will be due in a few days so you can send me a check, or I can draw on you as the payments fall due. Probably it will cost less for exchange to send me N. Y. draft for about $500 at a time.

I saw Thomas to-day, he says he thinks the attorneys for the Miner Boy have not yet found out about the default judgment and they only have until Monday morning to file a motion for

399 a new trial. It looks as though we were going to get that on a default.

Yours truly, W. F. PATRICK."

100 Q. I now show you a letter dated "Leadville, Colorado, April 13, 1882," addressed to "F. J. Bowman" and signed "W. F. Patrick," and ask in whose handwriting that is, if you know.

A. That is in the handwriting of William F. Patrick, one of the defendants is this suit, and was received by me in the due course of mail.

Paper referred to was offered in evidence and marked Plaintiff's Exhibit No. 17.

Mr. PARSONS: I object to that letter as incompetent and irrelevant.

The letter was then read as follows:

Law offices of J. B. Bissel, over Bank of Leadville.

LEADVILLE, COLO., *April* 13, 1882.

Mr. F. J. Bowman, St. Louis, Mo.

DEAR SIR: Yours of the 6th received. I only had one telegram from you and one letter. The telegram I answered twice, once to 5th Ave. and once to your house.

I have just seen Thomas, he says the Miner Boys have at last made a motion for permission to pay the costs and have the judgment set aside.

Thomas says the motion will not amount to anything as they neglected it when they had the opportunity of paying: and they certainly had time enough. That is the judgment that was given before. We were here the last time, and the one which you thought it impossible that they would not find out about before this court.

Thomas thinks they cannot now pay and that we will get
400 an order for possession. He hopes to argue the motion on Saturday. I think it would be well for you to send the agreement for consolidation or a copy of it to Patterson at Denver. As soon as that motion is argued we will know whether we are to have possession or not.

Sued the Colo. Prince for $2,000 and attached the mill and mine as soon as our attachment was set aside. We are down nearly 50 feet in Col. Sellers; the second payment will be due this week. We will need a small engine soon.

Yours truly, W. F. PATRICK.

101 Q. I next show you a letter dated "Leadville, May 21, 1882," addressed to "Frank J. Bowman" and signed "William F. Patrick," already identified as in the handwriting of William F. Patrick, and being Exhibit A of defendant's, and ask in whose handwriting that is.

A. That is in the handwriting of W. F. Patrick.

Paper referred to is offered in evidence and marked Plaintiff's Exhibit No. 18 and is as follows:

130 WEST 6TH ST., LEADVILLE, *May* 21, 1882.

Mr. Frank J. Bowman, St. Louis, Mo.

My DEAR SIR: Yours of the 15th was received yesterdy. On Tuesday morning our shaft in the Col. Sellers was blown up by giant powder, and injured to the extent of several hundred dollars. As the contract was not finished the loss is not on us but on the contractors. I delayed writing to you about it in the hope that we might find and arrest the guilty party. Of course we know that the other forty who are working on the same claim instigated it, but as yet we have no proof which is sufficient for a criminal
401 action. The application for the injunction has not been commenced yet as several of the best attornies here have advised against it and say that the judge would not grant it owing to the fact that as yet we have no mineral in place, and that therefore our claim is not a legal one. The only way we can save our silver is to go ahead and beat them to mineral which we can easily do, notwithstanding the delay. If we can prove beyond a doubt that they had the shaft blown up which we are now trying to do, we can obtain an injunction, otherwise I am informed there is little hope for it. If you do not feel disposed to go ahead under these circumstances, I think I can find some one else who will go on with me.

I gave Wilson notice on the 8th of May that his money was due, and as he only has 10 days in which to pay he has forfeited his contract and is out. I can hear nothing from Patterson about our consolidation. I have written once this week and telegraphed twice about it, and have not had any answer. I will write again to-day. I don't see why he delays unless it is that Flynn has refused to go into the scheme.

In regard to my draft on you. I told you that I had no idea Wilson would pay, and that I would draw on you for the full amount $465 and in case Wilson did pay I would return it to you ; that was our agreement and yet in spite of that you telegraphed " rebates not satisfactory." I certainly do not like to be treated that way. I answered your telegram just as soon as it was delivered to me: By looking in your note book you will see the two amounts $280.69 and $465, and you said you would instruct the Boatmen's to pay either amount.

The boiler of the engine in the Colo. Prince has been stolen and we cannot use that on the Sellers. The property will be sold under Page & Blin's execution $260 and costs in June 4th. Let me hear from you in regard to it, what I am to do in case the
402 consolidation is not effected.

Yours truly,

W. F. PATRICK.

102 Q. I now show you a letter dated " Denver, June 22, 1882," and addressed to " F. J. Bowman " and signed " W. F. Patrick," and will ask you in whose handwriting that is.

A. That is in the handwriting of William F. Patrick, one of the

defendants in this case, and was received by me; I cannot fix the date when.

Paper referred to is offered in evidence and marked Plaintiff's Exhibit 19, and is as follows:

DENVER, *June* 22, 1882.

Mr. F. J. Bowman, St. Louis, Mo.

DEAR SIR: I arrived here yesterday and found that the case of the St. Louis *vs.* Colo. Prince was set for trial yesterday. It was however postponed till this afternoon and I think there is no doubt but that the St. L. will get a judgment for possession as they have their witnesses here and are ready for trial. The Colo. Prince on the other hand have no witnesses and no attorney, so old Rice has a very easy case to win. I saw Zobel in the court-room and he informed me that Flynn would be here to-morrow morning. If the judgment is given the St. Louis there will be no chance for the consolidation as Zobel and Flynn will feel too rich to do anything.

We made a mistake in not getting Rice and Chase into the consolidation as they have been working on Zobel and through him on Flynn to defeat all our plans, and I am afraid have succeeded in doing so.

Patterson tried to have the case postponed and failing in that refused to appear in it and now Zobel says he is afraid and
403 did not do as he agreed.

I am tired of the case, and if we do not form the consolidation when Flynn comes I think we had better let it rest for a time and see what comes of it. I don't feel disposed to spend another dollar on it at present.

In regard to your interest in the Col. Sellers, I think I know a man who will pay the rate you gave me $285.69 and take your interest off your hands and let me go right ahead with the work, which I would very much like to do. If you are willing to let it go on these terms which is the same proposition you made me in your office, please telegraph me immediately and I will try to make the arrangement.

Yours truly, W. F. PATRICK.

103 Q. I now show you two telegrams, each containing the same language and dated "Leadville, Colorado, 15th July, 1882," one addressed to "F. J. Bowman, at Ashland," and the other one addressed to "Frank J. Bowman, at 8th and Pine streets, St. Louis," and one signed "W. F. Patrick" and the other signed by "W. F. Patrick," and will ask you what you know about those telegrams.

A. I received each of them.

Papers referred to are offered in evidence and marked Plaintiff's Exhibits Nos. 20 and 21, and are as follows:

"LEADVILLE, COLO. 15, 1882.

To Frank J. Bowman: 8th and Pine Sts. St. Louis.

Acceptance too late; proposition was dependent on immediate acceptance in St. Louis; see my letter of fifth.

W. F. PATRICK."

"LEADVILLE, COL. 15, 1882.

Received at Ashland, 16.

404 To F. J. Bowman:

Acceptance too late; proposition was dependent on immediate acceptance in St. Louis. See my letter of fifth.

W. F. PATRICK."

104 Q. Do you know when?

A. I can't fix the date at this moment.

105 Q. I now show you a letter dated St. Louis, September 2nd, 1882, addressed to "Frank J. Bowman, at Merchants' hotel, St. Paul," and signed "W. F. Patrick," and ask you in whose handwriting that letter is.

A. That is in the handwriting of William F. Patrick, and was received by me; I cannot now fix the date when.

Paper referred to is offered in evidence and marked Plaintiff's Exhibit No. 22, and is as follows:

ST. LOUIS, *Sept.* 2, 1882.

Mr. Frank J. Bowman, Merchants' hotel, St. Paul.

DEAR SIR: I reached here this morning and hoped to find you, but Capt. Martin tells me you will not be back for several weeks. The St. Louis claim remains in about the same shape it was when I last wrote. Zobel has been in Leadville and did the assessment work for the present year. As you know the U. S. marshal put us in possession of the Colo. Prince, and their time for appeal has gone by so that claim is our of the way. Howell has a scheme for a consolidation of those claims, viz: The St. Louis, Miner Boy and Fanny Rowlings, which you remember joins the St. Louis on the east. His scheme is this to form a company with 500,000 shares of these give 100,000 to St. Louis, 100,000 to Miney Boy 75,000 to Fanny Rowlings and 225,000 to remain in treasury. This stock to be all pooled
405 as suggested. I promised him I would tell you of it, but I don't favor it much as I think we ought to have a larger share. He says he will take in a portion of the St. L. and wait till the other fellows are ready.

I think we can beat the Miner Boy in the suit. I sent you from Leadville an agreement concerning the Col. Sellers in which I agreed to pay that note $288.70 and you relinquished all rights under the agreement. The shaft is still going down. The note will be due about Sept. 19, so please sign the agreement if you have not already done so and send to me as soon as possible so that I may arrange to take up the note.

My address for 2 or 3 weeks will be, Knoxville, Tennessee.

Yours truly, W. F. PATRICK.

The paper purporting to be a copy of the contract of February 17th, 1882, between Frank J. Bowman and William F. Patrick on one side and Stebbins and Robison and Glover and Howard on the

other, which is offered in evidence in lieu of the original, by consent of parties to be corrected if a mistake should be subsequently found.

Paper referred to is offered in evidence and marked Plaintiff's Exhibit No. 23, and is as follows:

This agreement made and entered into this 17th day of February, A. D. 1882, by and between Theodore C. Stebbins, Lyman Robison, Samuel J. Glover, and Harvey Howard, parties of the first part and Wm. F. Patrick of Leadville, Colo. and Frank J. Bowman of St. Louis, Mo. parties of the second part, witnesseth,

That whereas the parties of the first part own certain mining claims lodes, ledges, veins or deposits, known and designated as the "Col. Sellers" and "Accident" lodes situated in the California mining district, Lake county, Colorado, and particularly de-
406 scribed in a certain deed of conveyance this day executed by the parties of the first part, conveying an undivided one-half of said property to the parties of the second part, for the expressed consideration of five thousand dollars, and which said deed has this day been deposited in escrow with C. C. Parsons, to be delivered to the parties of the second part when they shall have sunk a good and substantial shaft in and upon said premises to limestone in place or bed rock, unless pay mineral is found in said shaft before reaching the limestone in place or bed rock. Said shaft shall not be less than eight feet by four feet in the clear, and shall be well timbered and constructed in a good workmanlike manner. It is also agreed by the parties of the second part that the work of sinking said shaft shall be commenced within thirty days from this date and continued with no intermissions exceeding ten (10) days at any one time (unless the inclemency of the weather shall prevent) until pay mineral or limestone in place is reached. The parties of the second part further agree to make application for a patent to said mining claims and to pay all the costs and expenses of every description incident to and growing out of said application until patents therefor have been obtained. The work of procuring patents on said claims shall be commenced within sixty days from this dare, and shall be diligently prosecuted until patents have been obtained. It is further agreed that any failure on the part of the parties of the second part to so sink said shaft or prosecute said application for patents shall work a full forfeiture of their rights under this contract.

And on the part of the said parties of the first part it is agreed that the said one-half interest so conveyed is and shall remain free from all liens and incumbrances. It is also agreed by the parties hereto that any machinery or shaft-houses placed upon the
407 said property one-half the cost of the same shall be taken from the first product of the mine, provided however that if no mineral is found therein the machinery shall remain the property of the said parties of the second part.

In witness whereof the parties hereto set their hands and seals the day and year first above written.

THEODORE C. STEBBINS.
LYMAN ROBISON.
HARVEY HOWARD.
SAMUEL J. GLOVER.
WM. F. PATRICK.
FRANK J. BOWMAN.

Acknowledgments of Stebbins, Robison, and Patrick taken by Jas. R. Hammond, N. P., Lake Co., Colo., Feb'y 17, 1882.

That of Frank J. Bowman, by Geo. Wolff, N. P., St. Louis, Mo., M'ch 6th, 1882.

That of Harvey Howard, by Lucas Flattery, N. P., Wayne Co., Ohio, M'ch 8th, 1882.

That of Glover by C. J. Hambleton, N. P., Cook Co., Ills., M'ch 13th, 1882.

Recorded in the records of Lake Co., Colo., in Book 72, page 493. Filed for record M'ch 16th, 1882.

Mr. McGINNISS: The paper of August 28th, 1882, signed by Frank J. Bowman, called a proposition by him to sell to William F. Patrick his interest in the Col. Sellers and Accident mines, as heretofore shown to said Bowman on his cross-examination by defendants, is offered in evidence by plaintiff, a copy of which has been incorporated in the record. The defendant has the original, and a copy is incorporated in this record.

The original deed from Frank J. Bowman to William F. Patrick for the interest of said Bowman in the Col. Sellers and Acci-
408 dent mines, a deed bearing date the 19th of October, 1882, and recorded in the State of Colorado, Lake county, recorder's office, on November 6th, 1882, in Book 81, page 564, is offered in evidence by the plaintiff and marked Plaintiff's Exhibit No. 25, and is as follows:

Mining Deed.

This indenture, made the nineteenth day of October, in the year of our Lord eighteen hundred and eighty-two, between Frank J. Bowman, of the city of St. Louis and State of Missouri, party of the first part, and William F. Patrick, of the city of Leadville and State of Colorado, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of ten thousand (10,000.00) dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns, all his right, title and interest in and to the "Col. Sellers" and "Accident" claims situated on Iron hill, in the

California mining district, in the county of Lake and State of Colorado.

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges, and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever,
409 as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, together with the appurtenanves and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

Signed, sealed, and delivered in presence of—

FRANK J. BOWMAN. [SEAL.]
—— ——. [SEAL.].

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

I, Charles D. Greene, Jr., a commissioner for Colorado in and for the city and State aforesaid, do hereby certify that Frank J. Bowman, personally known to me to be the person whose name is subscribed to the foregoing deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and official seal, at St. Louis, Missouri, this twentieth day of October, A. D. 1882.

C. D. GREEN, JR.,
Commissioner for Colorado at St. Louis, Mo.

Plaintiff now offers the deed from Robison and Stebbins, Glover and Howard, to William F. Patrick and Frank J. Bowman, bearing date the 17th of February, 1882, for an undivided half in-
410 terest in the Col. Sellers and Accident lodes; which said deed is recorded in the State of Colorado, county of Lake, recorder's office, November 6th, 1882, in Book 81, page 563.

The paper referred to is offered in evidence and marked Plaintiff's Exhibit No. 26, and is as follows:

This indenture, made this seventeenth day of February in the year of our Lord one thousand eight hundred and eighty-two between Lyman Robinson and Theodore C. Stebbins of Lake county Colorado, Samuel J. Glover of Cook county, Illinois, and Harvey Howard of the county of Wayne, and State of Ohio of the first part, and William F. Patrick of Lake county, Colorado and Frank J. Bow-

man, of the county of St. Louis, and State of Missouri of the second part, witnesseth,

That the said party of the first part, for and in consideration of the sum of five thousand dollars lawful money of the United States of America, to the said party of the first part, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, conveyed and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to their heirs and assigns an undivided one-half interest in and to the following-described mining property, situated in the California mining district, in the county of Lake, State of Colorado, to wit: That certain quartz-mining claims, lodes, leads, sledges or mineral deposits known as the Col. Sellers and Accident lodes being situate on the southeast slope of Iron hill north side of California gulch and between the A. Y. mine and the ore school house. For a full description of said Col. Sellers and Accident lodes, reference is hereby made to the location certificate thereof
411 which are of record in the office of the recorder of deeds of Lake county, Colorado.

The Col. Sellers lode is recorded in Book O, on page 44.

The Accident lode is recorded in Book S, on page 86.

(The intention being to convey hereby an undivided one-half interest in the patent title of the United States to be hereafter obtained, the application therefor to be prosecuted in the name of the grantors.)

Together with all the dips, spurs, and variations, also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges, and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances; to have and to hold all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, their heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set *our* hands and seals the day and year first above written.

LYMAN ROBINSON. [SEAL.]
THEODORE C. STEBBINS. [SEAL.]
HARVEY HOWARD, *Pres't.* [SEAL.]
SAMUEL J. GLOVER. [SEAL.]

Signed, sealed, and delivered in presence of—

—— ——.

STATE OF COLORADO, } ss:
County of Lake, }

I, J. R. Hammond, a notary public in and for said county,
412 in the State aforesaid, do hereby certify that Lyman Robison and Theodore C. Stebbins, — are personally known to me to be the same persons whose names are subscribed to the foregoing deed, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said deed as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this seventeenth day of February, A. D. 1882.

J. R. HAMMOND,
Notary Public.

STATE OF OHIO, } ss:
Wayne County, }

I, Lucas Flattery, a notary public within and for said Wayne county and State of Ohio, do hereby certify that Harvey Howard, president of the Wooster Mining Company, — is personally known to me to be the same person whose name is subscribed to the *written* deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said deed as his free and voluntary act for the use and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 24th day of February, A. D. 1882.

LUCAS FLATTERY,
Notary Public.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Chalkley J. Hambleton, a notary public in and for the county of Cook and State of Illinois aforesaid, do hereby certify that
413 Samuel J. Glover, personally known to me as the same person whose name is subscribed to the foregoing deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said deed as his free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 13th day of March, A. D. 1882.

C. J. HAMBLETON,
Notary Public.

U. S. OF AMERICA, } ss:
City of St. Louis, State of Mo., }

The undersigned special examiner, at the instance of defendants in this cause, respectfully states and certifies to the court, as is pro-

vided in rule No. 67 of practice in equity, the following matters arising out of the examinations conducted by him, namely:

In the progress of the examination of Thomas W. McManus, a witness produced by the complainant, said witness produced a certain instrument in writing, which said instrument is attached to the deposition of said witness and is marked "Exhibit 2," a copy whereof is set out on page 34 of the testimony. Said witness testified that said instrument is in the handwriting of Annie Patrick, wife of the defendant William F. Patrick, and was found by witness among the papers of a deceased sister of the witness, in witness'es house at St. Louis. Complainant then offered said writing in evidence. Defendants, by their counsel, objected to said writing being admitted in evidence, alleging as grounds of objection that the same is incompetent and irrelevane, and defendants then requested the
414 examiner to suspend the examination and to certify or state said matter of tender in evidence and objections thereto to the court for the ruling of the court or judge thereon, which request was refused by the examiner at that time. Said witness further testified that the defendant James M. Patrick was known and designated by the name "Jemmie," and that the defendant William F. Patrick is designated in his family by the name "Will."

Said witness also produced a certain writing, which is attached to his deposition and is marked "Exhibit 3," a copy whereof is set forth on pages 36, 37, and 38 of the testimony. Said witness testified that said instrument is in the handwriting of the defendant James M. Patrick, a brother-in-law of the witness, and was found by the witness among the papers of his deceased sister, Mrs. James M. Patrick (p. 10), in witness'es house at St. Louis.

Complainant then offered said writing in evidence. Defendants, by their counsel, objected to the admission of said writing in evidence, alleging as grounds that the same is incompetent and irrelevant as against defendant William F. Patrick and because it appears to be a communication from husband to wife, and defendants, by their counsel, then requested the examiner to suspend the examination and to certify or state said matter of tender in evidence and objection thereto to the court for the ruling of the court or judge thereon; which request was refused by the examiner at that time.

Said witness also produced a certain instrument in writing, which is attached to his deposition and is marked "Exhibit 4," a copy whereof is set forth on pages 38 and 39 of the testimony. Complainant then offered said writing in evidence. The defendants, by their counsel, objected to the admission of said writing in evidence and assigned as grounds of objection that the same
415 is incompetent and irrelevant and is not binding on the defendant William F. Patrick and, further, because it is a privileged communication from husband to wife.

Upon the conclusion of the testimony taken by the undersigned as examiner the defendants, by their counsel, renewed their request that the foregoing matters of the tender by the complainant of said Exhibits 2, 3, and 4 in evidence and of the defendants' objections

thereto be separately and expressly stated and certified by the examiner to the court for its ruling thereon; and inasmuch as the defendants, by their counsel, represent to the examiner that it is material and important to them to have the ruling of the court upon said matters before going into defendants' proofs in this cause, the same are accordingly respectfully stated and certified to the court.

L. L. WALBRIDGE, *Sp. Ex'r.*

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

FRANK J. BOWMAN
vs.
WILLIAM F. PATRICK. } No. 2732. In Equity.

Testimony in rebuttal on behalf of the plaintiff before L. L. Walbridge, special examiner, taken at St. Louis, January 30th, 1888, and subsequent days to which the hearing was adjourned, at the office of E. McGinness, attorney for the plaintiff, Roe building, southwest corner of Pine and Broadway.

Present: On behalf of the plaintiff, E. McGinness, Esq.;
416 on behalf of the defendants, Messrs. Cunningham and Eliot.

F. J. BOWMAN, being recalled in his own behalf in rebuttal and being duly sworn, did thereupon depose and say as follows:

(By Mr. MCGINNESS:)

1 Q. In Mr. Whiting's deposition taken in this case he mentions an indemnity contract, signed by Stebbins and Robinson and made to William F. Patrick, and he said perhaps your name was in it also, by which Robinson and Stebbins were to indemnify Patrick and yourself for all expenses caused by the jumpers. I will ask you when you first heard of that indemnity contract.

Counsel for the defendants objected to the question on the ground that the witness has not stated nor does it appear that he ever heard of such a contract or that there was such in fact.

A. I first heard of it after the deposition of Mr. Whiting was taken in this case at Leadville. I never heard of it before.

2 Q. In the deposition of William F. Patrick, one of the defendants in this case, taken in Leadville the latter part of November, 1887, he mentions a note for $394.85 made by Stebbins and Robinson and payable to himself individually for the damages caused by the blowing up of the shaft of the Col. Sellers. When did you first hear of the existence of any such note or that they were to repay him for damages caused by the blowing up of that shaft?

Counsel for the defendant objected to the question as incompetent, irrelevant, and immaterial.

A. I first heard of it since Mr. Patrick's deposition was taken by

my counsel in this case, and in further answer I wish to say
417 that I can't be mistaken as to this, because it would have impressed itself upon my mind, and I would again say as to whether we should go ahead and do that work when the jumpers were contesting our right and make the expense when we were subjected to the liability of losing the whole without any indemnity from any one, I, in answer to that question, will further say that Mr. Patrick carefully kept those things from my knowledge.

All of the witness' answer except that which is directly responsive to the question is objected to as incompetent and irrelevant, and counsel for the defendants move that the same be stricken from the record.

3 Q. James M. Patrick mentions in his deposition that prior to your departure from St. Louis, in June, 1882, that you had some conversations with him, in which you mentioned that Levisey was to take the Wilson interest and abide the issues on that; did you ever have any such conversation with James M. Patrick at any time?

A. No; I feel confident I did not, for I have no recollection of ever hearing the name of Levisey until this suit was commenced; if I did ever even hear his name it has entirely escaped my recollection.

4 Q. James M. Patrick in his deposition also says that prior to your departure from St. Louis in June, 1882, that he saw you several times concerning the St. Louis matter, known as the St. Louis mine or claim matters, mentioned through the deposition. What did he say to you concerning that matter?

Objected to as immaterial, irrelevant, and relating to other matters than that in controversy, if the question is competent at all.

A. Mr. James Patrick came to me a number of times and was quite persistent in urging me to invest some money in a mining claim that he represented would be of great advantage to me.
418 He made very glowing representations as to it.

5 Q. Was that the St. Louis matter?

A. That is my recollection.

6 Q. Trying to get you to buy an interest in it?

Objected to as leading.

A. Certainly; I have so stated; that was the object of his visit and representations.

7 Q. Did you ever write or telegraph or communicate to William F. Patrick in any way prior to July 5th, 1882, that your address would be St. Paul, Minnesota?

A. No; I could not have done so, for I didn't know myself that it would have been, as I had not determined to go to St. Paul until after I went into camp, Bayfield being my point that season, as it had been for several seasons, and, learning that they were building

a new line of road over to St. Paul that came near to us from the West, I determined to go to St. Paul and investigate that matter.

8 Q. You have seen, have you, this statement copied into William F. Patrick's deposition which he says he sent with his letter of July 5th, 1882; you have seen that statement, have you? (Copy shown to witness.)

A. You showed me this this morning. I have no recollection of ever seeing such an account before at any time or place.

9 Q. William F. Patrick's letter of June 22, 1882, addressed to you, St. Louis, Missouri, was answered by your telegram from Ashland, Wisconsin, July 13, 1882. Where did you get that letter, as far as you recollect?

A. On the 12th or 13th of July, 1882.

10 Q. And you answered it when?

A. The day I received it or the next day, probably.

11 Q. By telegram from Ashland, Wisconsin?

A. Yes, sir.

12 Q. Now, where did you go from Ashland, Wisconsin?

419 A. My best impression is I went to Madison. I recollect going to Madison to look up a man about some land titles; it is *im*possible I went even down to a little town near Milwaukee that trip or another one to see a man there about getting some land from him, a leasehold on Bruhle river; then I went to St. Paul.

13 Q. Now, there was offered in evidence two letters written by William F. Patrick to yourself, one June 27, 1882, and one June 28, 1882, each addressed to you, St. Louis, Missouri. Where did you get those letters?

A. I must have received those at St. Paul.

14 Q. How did they get down to St. Paul?

A. Probably from Bayfield. I have not, Mr. McGinness, any distinct recollection as to that matter, but I only say that I am sure I would send word from Ashland to Bayfield, knowing that I was going to have further letters sent to me there, and by referring to my correspondence, knowing these facts, I should say I must have received them at St. Paul.

Counsel for the defendant objected to the answer as an inference.

WITNESS: Well, it is my judgment founded on facts that I do remember. As to the identical fact of receiving and opening the letter at a given place I have no such recollection, but from other incidents I do remember I should say I must have received the letter at St. Paul.

15 Q. That is, you were going from Ashland to St. Paul?

A. Yes, and I would leave word at Bayfield to have them forwarded there or send word over to Ashland from Bayfield. Bayfield is across the bay, you understand, about eighteen miles from Ashland, where I was telegraphing. Now, I wouldn't go back to Bayfield. I was going to St. Paul, and therefore I would likely send to have those other letters sent down, and would probably get them there.

420 16 Q. Bayfield was your post-office address?

A. Bayfield, Wisconsin, was prior to the opening of this mine in August, 1882, and had been my post-office address during the summer for a dozen years.

17 Q. Do you know when you got from Judge Laughlin the paper in the form of a contract signed by William F. Patrick and witnessed by E. A. Reynolds—a paper sent to you—and that you refused to sign on the 28th of August—do you know when you got that from Judge Laughlin?

Counsel for the defendants objected to the form of the question as assuming facts not shown.

A. Well, no; I am not distinct that I got that at all from Judge Laughlin. My impression would be that Judge Laughlin handed that contract to you (Mr. McGinness), but I don't remember. I wish to say, if proper, that I received some letters from Judge Laughlin concerning which I have fully testified and passed them over to you, or passed them back to Judge Laughlin and he passed them to you, after I had the right to use them, but I don't think the contract you refer to was in those. I found that afterwards. That is my impression.

18 Q. James M. Patrick's note of June 25, 1882, to you—when was that made, so far as you recollect?

A. My impression was before looking over my letters and telegrams that that note was made on that day and that the contract was of a different date from what it was made. I am of the impression that the contract is of the date when it was made, and the note couldn't have been made at that date, because I was not in St. Louis, I find, on that date, and my best impression would be that he must have given it to me later—on my return in September. I will not say, but he might have given it before and dated it ahead,

but my best impression would be when I saw him in Sep-
421 tember he gave me the note and dated it then of the date, as it was a nine months' note, to make it fall due even with the year, according to the contract. That seems to have been done by the papers.

19 Q. In your deposition-in-chief occurs the words "a printed statement;" what have you to say in regard to that?

A. That is an error. The word should be "pretended statement." If I so testified, it was a mistake.

20 Q. You think that was an error made by the stenographer?

A. I think it was an error in his hearing me, or in transcribing. It should be "pretended statement" instead of "printed statement."

21 Q. When was that pretended statement made, as far as you recollect; when did you see it?

Counsel for the defendants objected to the question on the ground that it was a matter not brought out or touched upon in the testimony of the defendants and not proper in rebuttal.

22 Q. William F. Patrick, in his deposition, testified that he was

paying your traveling expenses and hotel bills when you and he went from here to Denver and Leadville; what have you to say about that?

A. Oh, I paid my traveling expenses. I feel certain of that, because there was a large bill on account of my paying my traveling expenses that were incurred in his business. At one time I saved my expenses by stopping at his house while I was in Leadville, but what expenses were paid I paid them.

23 Q. I am asking about railroad fares and hotel bills in Denver.

A. I paid them as far as I paid my own. I had some passes that I used, and I obtained one or more for him; but I paid my own expenses, I am quite sure, on the last trip to Denver.

24 Q. At what hotel did you stop in Denver?

A. The Windsor.

25 Q. Who were the proprietors of that hotel in May, 1882?

422 A. I cannot at this moment recollect. If I could hear their names mentioned I might recollect, but I stopped at so many hotels I can't remember.

26 Q. I show you a check drawn by yourself, dated May 8th, 1882, on the Boatman's savings bank, St. Louis, Missouri, dated "Denver, Colorado," and made payable to the order of Bush, Tabor & Co., $50, and ask you who Bush, Tabor & Co. are or were at that time.

Counsel for the defendant objected to the question as incompetent, irrelevant, and immaterial and as having nothing to do with the issues in this case.

A. Bush, Tabor & Co., I recollect, were the parties who kept that hotel. I drew this check there, as a part of the expense, which was paid by my bank here.

Counsel for the plaintiff offered the check referred to in evidence, and the same was marked Exhibit X, and is as follows:

"DENVER, COLO., *May 8th*, 1882.

Boatman's savings bank, St. Louis, pay to Bush, Tabor & Co. or order, fifty dollars.

(Signed) FRANK J. BOWMAN."

Endorsed: "Bush, Tabor & Co., by Moss."
And marked "Paid."

27 Q. William H. Wilson in his testimony makes mention of the McDermoth placer, in which he says you and himself and Patrick were interested. I now show you a telegram dated February 15, 1882, addressed to you and signed William H. Wilson and W. N. Patrick, and ask if you received that telegram.

Counsel for the defendants objects to the question as irrelevant and as entirely immaterial to this case.

A. Yes, sir; I received that telegram.

423 Telegram referred to offered in evidence and marked Exhibit Y and read as follows:

"LEADVILLE, COLORADO, *Feb.* 15.

Night message (addressed:)

Frank J. Bowman, 219 Chestnut street, St. Louis:

Examined placer claim. Can get perfect title twenty acres patented, thirty thousand dollars. Great bargain. Shall we close? Answer immediately.

(Signed) W. H. WILSON.
W. N. PATRICK.

Telegram objected to as incompetent, irrelevant, and immaterial.

28 Q. I now show you a letter dated Leadville, March 22, 1882, addressed "Dear Brother" and signed "W. F. Patrick," and ask in whose handwriting that letter is, if you know.

A. That is in the handwriting of William F. Patrick and the signature is his.

Paper referred to is marked Exhibit Z and reads as follows:

130 WEST 6TH STREET, LEADVILLE, COLO., *March* 22, 1882.

DEAR BROTHER: I will give Mr. W. H. Wilson a letter of introduction to-day. He leaves here for St. Louis to-morrow evening and will be in St. Louis at the Southern on Sunday. He goes on business of his own and also on some in which we are interested together. He will explain to you probably about our placer claim, in which we have been trying to get Bowman. I believe it to be a good thing, as I had Mr. McKenzie at work there for a week and he made a good report on it. McKenzie was foreman for us on the Aftermath a long time, and is an old-time miner in Cali-
424 fornia and all over the West. He is a thoroughly practical man, and his opinion is entitled to considerable consideration. Perhaps if Bowman don't take hold of the placer scheme, you can introduce Wilson to some one that will, possibly Ward or some of his friends would like to take it. I think it is pretty safe; Wilson is apt to be too enthusiastic, but you can make allowances for that. I did not receive the paper containing the notice of the Lindell election and your postal card came too late.

Your brother,

(Signed) W. F. PATRICK.

Counsel for the defendants objected to this letter as incompetent, irrelevant, and immaterial.

29 Q. Do you know the time by the nearest railroad route of travel from Leadville, Colorado, to Knoxville, Tennessee, in July and August, 1882?

A. About sixty hours. They have shortened the time since.

30 Q. In the depositions taken at Leadville and Denver in November and December, 1887, several witnesses speak of iron stains

and pyrites and the encouraging appearance of the shaft of the Col. Sellers as appearing in the shaft in the latter part of July, 1882. Did you ever hear of these indications prior to their being mentioned by those witnesses in their testimony?

Objected to by counsel for the defendants as incompetent and improper and as being a suggestion to the witness by the counsel of a digest by the counsel of the testimony and because it assumes facts not shown.

A. The first that I heard of the matter in any way is since this case first commenced.

The letter of June 27th, 1882, by William F. Patrick to F. J. Bowman, not having heretofore been formally read in evidence, is now read in evidence in full as follows:

425 "LEADVILLE, *June 27th*, 1882.

Mr. F. J. Bowman, St. Louis.

DEAR SIR: I saw Lyles this morning. He says he only bid in the engine, boiler and hoister, and that the sale was then stopped. He says that under the statutes that the property couldn't be sold as we wish, but that the personal property must be offered first. Please let me know about it. I would also like to have an answer in regard to the proposition I made you about the Col. Sellers to return you your note, and forfeit your share in the contract. There is a party here who will take it.

Yours truly,

(Signed) W. F. PATRICK.

Cross-examination by Mr. CUNNINGHAM, for the defendants:

31 X Q. In your direct examination you stated that the shortest time from Leadville to Knoxville, Tennessee, was about 60 hours by rail. Did you ever go from Leadville to Knoxville by rail?

A. I gave you my estimate of about 60 hours as the time. I think that is the time; it may be as much as 72 hours.

32 X Q. Where were you at the time when you received this letter from William F. Patrick, dated Leadville, 22nd of June, 1882?

A. I have no remembrance further than as indicated by my telegram of July 13 and my general remembrance as to my whereabouts at that time.

33 X Q. And from those facts where do you say you received it?

A. It would look as though I received it at Ashland.

34 X Q. Can you explain how it could have arrived at Ashland?

A. Oh, yes.

35 X Q. Please do so.

A. My letters came into Bayfield. Sometimes they would
426 send letters to me out by the pine hunters. The pine hunters are men who go through the woods estimating the number of pines upon an acre; very responsible parties. As we were forty miles in the wilderness, they would entrust my letters to these men whom they knew would give them to me. If they hap-

pened to come to my camp they would bring them in and stay over night. If they had letters to bring to me they would come and hand them to me, as I was very well known in northern Wisconsin at the time, and if they didn't come to the camp, if they came back to Ashland there, they might leave them for me or send them back to Bayfield. I received my letters in a very irregular manner, sometimes not receiving any for six weeks at a time when I was in the wilderness of Island camp, as it was then, and having no remembrance of the matter and being guided in forming a conclusion as to knowing where I sent the telegram from and as to knowing where I went from and where I was traveling, I should presume that was handed to me en route from my camp in Ashland or out of Ashland, but it is a presumption—not a recollection, but a presumption drawn from the surrounding circumstances.

36 X Q. What directions had you given at St. Louis about forwarding your mail?

A. As a matter of recollection I cannot answer; as a matter of presumption, based upon a habit of several years, my directions were to forward it to Bayfield.

37 X Q. But, as a matter of particular recollection, you can't say how this letter came actually into your possession at Ashland, if that be the case?

A. I have no recollection of the distinct fact of any person handing that particular letter to me or of my receiving it at a particular place; none whatever.

38 X Q. Do you know of any reason why this particular letter should have been sent to you and not any other letters that may have lain in the post office at Bayfield for you at the time
427 when they might have been taken out of the post office at Bayfield?

A. I know it might have been sent if it arrived there by the 25th. I know some one may have been going out that day and brought along that letter and brought along any other of the same date, and of those brought this letter may not have reached me at all until I came to where I ordered my mail forwarded. That is quite probable, speaking as an inference and not from recollection of the manner in which my mail got to me.

39 X Q. Do you remember whether on your way from camp to Madison you passed through Bayfield?

A. I was trying to recall this morning the way in which I came at that particular time, but as there were three or four trails, one to Ashland, one down the river to a cross-road, and one into Bayfield, I can't recall on which trail I came in at that particular time.

40 X Q. May you not have received this letter of the 22nd of June at Bayfield instead of at Ashland?

A. That is possible. I was trying to recall, but I cannot. I may have received that, and the other letters may have been forwarded to me by parties as I have spoken of, which had not been delivered and, being returned back to Bayfield, reached me at St. Paul.

41 X Q. Do you remember, as a matter of fact, of giving any di-

rections to have letters that might be laying for you at Bayfield sent to St. Paul?

A. I don't remember it as a fact—that is, I don't remember of telling the postmaster so, or if I sent that word from Ashland of either writing it or sending it by messenger as an independent fact, I do not; but I am well satisfied in my own mind that knowing I was then going over to St. Paul and by a circuitous route that I would send word to get my letters, and it is a matter of inference, rather than remembrance, because I know that was my custom to get hold of my letters whenever I came out of the woods and
428 gather them up as fast as might be.

42 X Q. How long was it at that time your purpose to remain at St. Paul?

A. Only a short time. My purpose was to go to St. Paul and then go up the new road that was being laid out up into northern Wisconsin. Mr. Hart and myself had been informed it would likely reach up in the vacinity of our camp, and perhaps afford us a better mode of getting in and out than the long trail of 42 miles through the woods to Bayfield had for some years before given us.

43 X Q. When you say "a short time," please state more definitely what you mean, whether a few days, hours, weeks, or what.

A. Not a few weeks, but my intention was in reagrd to that route, which was the first I had ever heard of it, that if we found it more convenient to make our headquarters afterwards there.

44 X Q. At St. Paul?

A. At St. Paul. In my explorations at that time I wanted to get off the road and take an Indian with me to see how I could find a trail through to our camp, resulting in our change the next year of our headquarters over to St. Paul.

45 X Q. Do you remember whether you had any business to engage your attention in St. Paul at that time other than what you have just spoken of?

A. I don't recollect of any other. I have a recollection that was the object and purpose of my visit from the surrounding circumstances that took place in connection with it.

46 X Q. Do you remember as a matter of fact how long you stayed at St. Paul at that time?

A. I do remember that I stayed there not to exceed, I think, a day and then took a train, as I had intended to go up and make the exploration.

47 X Q. Where did you stay?

429 A. At the Merchants' hotel in St. Paul.

48 X Q. But when you went up the road did you go from the terminus of the road back to your camp?

A. I did, sir; and took an Indian with me.

49 X Q. And how long before that had it been since you were in St. Paul?

A. A number of years, I think.

50 X Q. You had not been there before that year?

A. I have no recollection of being there for some time before. I may have in some of my trips returned by way of going up the lake

to Duluth, where I had occasion to pay taxes. I may have some time, but I have no recollection of it now, come down home through St. Paul, but it wouldn't be to make any stop there, as we didn't make St. Paul our headquarters until after the building of the road by way of Gordon to Duluth.

51 X Q. Well, I will ask you to state whether you are sure that during this very season, the summer of 1882, you had not been in St. Paul prior to the time you have just spoken of.

A. Oh, I feel very sure I had not; very positive and certain I had not.

52 X Q. And then when you went up to the terminus of the road from St. Paul, what was the distance to your camp from the terminus?

A. It was about—it has been a disputed point—from 28 to 32 miles.

53 X Q. Did you go immediately back to camp when you got to the terminus of the road?

A. I went right through; right on; stayed over one night and went up the St. Croix river to see what the fishing and hunting there was, and possibly stayed a day at Gordon, and went from there with the Indian boy; a young Indian; I shouldn't say a boy, but a young Indian, through to my camp.

54 X Q. What day do you fix as the day of your arrival at camp from your trip?

430 A. I can't say the date. My recollection is that I stayed only one night at St. Paul when I went up this road and stopped to see what kind of fishing places there were—the trout streams—and as to the hunting, and examined the country so far as the camping and fishing was concerned on the upper portion of the road some few days, and then from the end of the road with the Indian I went through to camp and rejoined Mr. Hart, but I can't recollect now just the length of time.

55 X Q. Can you approximate the date of your return to camp?

A. I cannot; I have no memorandum by me by which I could come at it now, but it was several days.

56 X Q. Would you say that was as early as the 20th of July?

A. No; I should not think it was that early.

57 X Q. Would you think it was as early as the 25th of July?

A. No; I should not think it was that early.

58 X Q. Would you think it was as early as the 1st of August?

A. That would come nearer to my impression about the matter, and yet there was nothing to mark it, and time slips away when you are on hunting and fishing excursions, one day being very much like another, and there is nothing in my mind to fix the date.

59 X Q. You spoke in your former testimony of having some notes or private memoranda of your summer tour. Have you looked at those notes to refresh your memory at all upon this subject?

A. I have not as to what you are now speaking of. If I had them at hand, I presume I could do so.

60 X Q. Now, assuming, for the sake of argument only, that the

first of August was about the time of your return to camp after your visit to St. Paul, how long did you stay at your camp after that before going away at all?

A. I should think a couple of weeks.

61 X Q. And then where did you go?

431 A. I then went to Bruhle river, I think, with Mr. Hart or part of the way there to establish an outpost of our camp, where we have since built, and returned to St. Paul, as I recollect, before coming back to St. Louis, but I am not clear in my recollection as to that, whether Mr. Hart came back by way of St. Paul and I by way of Bayfield, or whether I came back by the way of St. Paul, but I think I did, and he came back by way of Bayfield to look after our affairs there, where had been our permanent headquarters.

62 X Q. Would you fix about the middle of August as the time at which, probably, you went from your camp to go to Bruhle river?

A. About that, I should think.

63 X Q. How far was the camp of Bruhle river from your camp—your regular headquarters?

A. About thirteen miles.

64 X Q. And how did you go; by boat?

A. By wagon road; sometimes I walked and sometimes we would get an Indian pony to take over some of our things and sometimes we would go with one horse and ride and tie in going from one camp to the other.

65 X Q. Who was with you at your regular camp between the time of your return, say about the first of August, and the time when you left your camp to go to Bruhle river, about the 15th of August?

A. Oliver A. Hart.

66 X Q. Any one else?

A. Jack Winston, our black cook. I don't recollect of anybody else being there during that time.

67 X Q. And you and Mr. Hart went together to Bruhle river?

A. We went together part of the way. I was trying to recall whether we went as far as the Indian and then took the trail back to the terminus of the road or whether I went clear over with him. I know after going back to the terminus of the road I made another trip to survey a route by way of the St. Croix lake and struck the upper portion of the Bruhle and came down that and met Mr. Hart on the trail, so that we could take a full survey of that stream before making a final location.

432 68 X Q. What is about the distance from Bayfield to your regular camp?

A. About 42 miles.

69 X Q. What is the distance from Bayfield to the camp of Bruhle river, of which you have spoken?

A. About 55 miles. I am speaking of the way the trails then run. The trails are different now.

70 X Q. I mean the way one would go at that time?

A. Yes, sir.

71 X Q. Was it necessary or most convenient to pass by your regular camp in going from Bayfield to your camp on the Bruhle river?

A. No; the trail run, or road, or whatever you might call, it run near Pike lake. Our camp was located on an island in the lake, perhaps a mile and a half from the regular trail, so that sometimes a party coming out on that road, if they didn't find it convenient to come over in our boat to stay over night at our camp, would sometimes carry our letters up and not deliver them at all and take them back to Bayfield.

72 X Q. How many days' journey, as persons would usually travel, was it from Bayfield to your camp on the trail?

A. One day as we usually traveled; leave in the morning and get in at night.

73 X Q. Was there much passing at that time between the camp on the Bruhle and Bayfield?

A. No; it was paine hunters mainly.

74 X Q. About how often did you have access or communication with Bayfield?

A. I have been four or five weeks without seeing or hearing from Bayfield.

75 X Q. Do you remember how it was that summer?

A. I remember there was one space that we didn't hear from Bayfield or see any one. Mr. Hart and I were by ourselves for a long period of time from the 1st of June and July and the early part of that season.

433 76 X Q. How was it at that time that you were on the Bruhle river, say about the 15th of August?

A. There was no one with us that season; we hadn't built our house on the Bruhle, and there was no one with us that season, excepting Mr. Hart and myself and the negro man; I don't recollect whether it was Jack Winston or the other man; we had with us a negro cook.

77 X Q. Did either of you go to Bayfield during the time you were on the Bruhle? I mean to came back; I don't mean when you made your final return.

A. I don't recall, but I think Mr. Hart didn't go in at all from the time he came out in June until he went in in the fall.

78 X Q. How was it with you about the time you came in on the 15th?

A. I have stated I went in either on the Ashland or Bayfield trail, I don't remember which.

79 X Q. About when?

A. About the 13th of July and went down to Madison.

80 X Q. But you don't understand my question; I ask whether you, after the 15th of August, left your regular camp and went to your camp on the Bruhle river; whether after that you went into Bayfield or to Ashland from your camp until you finally quit the camp on the Bruhle that summer.

A. It is a hypothesis that it was the 15th of August when I went there.

81 X Q. Exactly.

A. I have a recollection of going back to Gordon and going up, as I have narrated, the St. Croix Lake route to the head of the Bruhle, and of making both those trips that season; that was the season in which I think one or two Indians accompanying me done considerable exploring, with a view of locating a trout-fishing camp.

82 X Q. When did you that summer finally quit your camp on the Bruhle?

A. In September, my recollection is.

83 X Q. About what time?

A. In the early part.

84 X Q. As early as the 5th?

A. I should think so.

434 85 X Q. Now, the question I wish you to answer is whether you have any recollection of going to Ashland or to Bayfield between the 15th of August and the 5th of September.

A. I think I did, but I am not sure.

86 X Q. And about what time?

A. There is nothing that would enable me without memoranda to place the date.

87 X Q. Did you go to Bayfield or to Ashland or to both?

A. I have no means of fixing on that particular year, and if I should attempt to do so without memoranda I might be simply confusing. My headquarters had been at both so many years and my trips had been so frequent from Bayfield to Ashland, at this length of time it is hard to designate the trips I made in a particular year It is only by means of memoranda that I have been enabled to establish that this year was the year I was seeking a location for our fishing camp at Bruhle—that I had made these particular trips.

88 X Q. If there be a fact which leads you to the impression that you did go in from your camp on the Bruhle to Ashland or Bayfield between the 15th of August or the time at which you arrived at the Bruhle camp and the 5th of September, the time you finally left the Bruhle camp that summer, what is the fact which leads up to that?

A. I recollect of making a trip from Bruhle river to Bayfield for the purpose of seeing a man there to whom we had loaned some money about paying his interest. He was to come out to camp and fix it up out there, and, he not coming, I had to make the trip in, but whether it was this particular year I cannot, without memoranda, determine; I have been trying to recall.

89 X Q. I understand you to say you don't now recall with distinctness just by what route you returned from your summering that year to St. Louis?

A. My best impression is that I returned by way of St.

435 Paul, but since you have been asking questions it refreshes me. I remember, on my first exploring trip, which was this season down the Bruhle, I returned the same way with the Indian and carried a large lot of trout, and I think I came down into St.

Paul and that Mr. Hart went by Bayfield when we broke camp and came out in the early part of September; that is my best impression and it is quite a distinct one from having my mind now directed to it.

90 X Q. You were interrogated this morning about your knowledge of a certain note of Robinson and Stebbins for about $384.95, supposed to be the sum paid by them to Mr. Patrick on account of the blowing up of the shaft in the Col. Sellers. Have you any distinct recollection now of ever having paid any part of that sum of money?

A. Why, certainly not; I didn't pay that note; it was not mine.

91 X Q. No, but the question is supposing that note to have been in reimbursement for the expenses incurred by William F. Patrick or William F. Patrick and yourself in sinking that shaft. I ask you whether you have any recollection of having disbursed any part of that sum of money—that sum of money which that note was intended to reimburse.

A. I have no recollection on the subject further than already stated in my previous examination, that Mr. Patrick made me a statement of what was due, a general statement, I do recollect that, and he gave as an excuse for some things being more than expected that there had been trouble about the blowing-up business, and I do recollect that it was a matter between us that I thought we ought to go slow until we had our legal rights determined and not get into any unseemly controversy in our affairs, and that we ought not to spend money that perhaps we might lose, and I have been much surprised to learn during this examination that Mr. Patrick was getting himself indemnified or taking the indemnity from
436 Patrick and Bowman, of which I had no knowledge at the time.

92 X Q. If you ever paid any part of that sum of money, when do you say it was paid by you?

A. The payments were made by me, as I have indicated before, by leaving the balance that was due me from Patrick in his hands to expend by payments that were made to him subsequently, and the settlement being made between us as I have stated. I think one in the early part of May and one in June.

93 X Q. Do you remember paying to him any sum of money, actually, except on the settlement made about the 19th of June, 1882?

A. I remember of paying several sums of money for him by way of expenses, for which I was to have credit for my share of the expense incurred in sinking the shaft.

94 X Q. When were those payments made?

A. From time to time during that period of time that I had been engaged for Patrick. I had been working for him and had paid my expenses and had been to Leadville, and I cannot recall how many times, and had paid my expenses and advanced my own moneys for him in the conducting of his business, and those were returned to me by way of credits for my share of the expense in sinking the shaft and so agreed between us.

95 X Q. But actual payments of money I speak of and not a settlement of account.

A. I do not recall and cannot without the aid of memoranda the items of the accounts or settlement at this period of time, and it is impossible for me from memory to do so.

96 X Q. Can you remember any occasion in which you paid to William F. Patrick any sum of money on account of the expense of the Col. Sellers shaft?

A. As I say, I have not a distinct recollection of any single item; I only knew generally that I had been paying my expenses
437 and it was agreed that we would have a settlement as to those, and I do remember that we had a settlement and I do remember about the incidents; that we set it all down in a book what we had arrived at, and I do recollect I made a settlement with him before I left in June to go north, but the particulars and the details of that settlement I cannot, as a matter of memory, recall a single one of them at this time.

97 X Q. Do you remember or can you indicate any time at which you ever made an actual payment of money to William F. Patrick on account of the expenses of the Col. Sellers shaft?

A. I repeat again, I do remember expending in the trips made moneys that were refunded to me in the way of credits, but if you want to know if I remember of handing him a bill or a check as a specific thing at a specific time I have not in my mind an affirmative recollection of an incident of that kind.

Signature waived.

At this point, by consent, the further taking of testimony in this cause was adjourned, subject to future notice.

ST. LOUIS, *February 10th*, 1888.

Parties met pursuant to agreement.

Present as at the last meeting.

Mr. MCGINNESS (counsel for the plaintiff): On the 31st day of January I delivered to the attorneys for the defendants a copy of a contract of indemnity by Stebbins and Robison to Patrick and Bowman, handed me by J. C. Whiting. There is a copy of a certified notice on the defendants to produce the original. (To Mr. Eliot:) Have you the original here?

Mr. ELIOT (of counsel for the defendants): In pursuance of that notice defendants' counsel now produces the original of the paper called for and hands it to the plaintiff's counsel.

438 Mr. MCGINNESS: You admit the signature.

Mr. CUNNINGHAM: This is admitted to be the original paper.

Mr. MCGINNESS: Plaintiff now offers in evidence the original indemnity contract, dated "Leadville, Colorado, March 27th, 1882," and signed "Lyman Robison and T. C. Stebbins," and which is in full as follows:

"LEADVILLE, COLORADO, *March 27th*, 1882.

We hereby agree to manage and conduct all litigation necessary to protect and defend our title and right of possession to the Col. Sellers and Accident lodes, and to pay all costs and expenses in and about the same, so far as the pending difficulty with McKenzie, McNeil, McFee and their associated is concerned and we hereby agree to save William F. Patrick and Frank J. Bowman from any costs or expenses so far as said properties are concerned during the time said property is worked by them under a certain contract made by them with us.

(Signed) LYMAN ROBISON.
T. C. STEBBINS."

Defendants' counsel objects to the above as irrelevant and immaterial.

(Paper marked Exhibit X X.)

Mr. MCGINNESS: I now offer in evidence the letter already used in evidence and on cross-examination of the defendants at Leadville, signed "W. F. P." and addressed "Dear brother," dated Leadville, July 31st, 1882," and which reads as follows:

"DEAR BROTHER: Annie received a letter from Eddie this morning in which he said that you were in St. L. so I write to ask you to see Maxon, and find out what was the amount of the Lindell R. Co. dividend for the last ½ year. They mailed me a check for one hundred dollars ($100) which seemed to me an exceedingly small
439 int. on seventy-five hundred dollars ($7,500) for six months.
We were sorry to hear of Mrs. McManus' illness and hope she is now much better. The shaft on the Col. S. is now about 215 ft. and is looking very encouraging. Please see Maxon and let me know. Annie sends love to you and Fannie.

Your brother, W. F. P."

(Marked Exhibit Y Y.)

Objected to by defendants' counsel on the ground that a call was made upon the plaintiff by the defendants at Leadville, Colorado, for the production of all papers and writings in the hands of the plaintiff or his counsel executed or purporting to have been executed or written by the defendants or either of them, and this should have then been there introduced.

Plaintiff's counsel states to the defendants' counsel they are mistaken; that no such notice to produce any letters from one of the Patricks to another Patrick was ever given.

Plaintiff now formally offers in evidence the letter that was shown in evidence and on which witnesses were cross-examined at Leadville, which letter is dated "Asbury P. O., Knox Co., Tennessee, August 17th, 1882," addressed "My dear son," and signed "Mother," and which letter is as follows:

"MY DEAR SON: On last Tuesday Eddie and self went to K. to bring out Mrs. Dickinson. We stopped to see Annie, of course; found Mrs. Hale feeling better but very weak; A. jubilant over letter

received the day before from Willie. He wrote her that they had found mineral in the mine, but (conservative ever) thought it was only a small pocket in the porphyry. While we were there the evening mail brought another letter from W. which E. carried
440 over to A. in order that we might have the very latest news before going home. In the letter he said that a clearly defined mineral vein extended entirely across the shaft and he was more than pleased with the outlook of the mines. Now, it does occur to me that you might do well to have W. secure you a larger interest in this property, which I doubt not W. could easily do, as his partners are hard up, and, as you already know, $\frac{1}{16}$ has been sold. Remember, I do not advise this; but as you will have more money than you will have immediate use for you would be safe, I think, in leaving it to W.'s judgment, as he is not enthusiastic nor very sanguine."

(By consent of counsel the remaining part of the letter in relation to family matters is omitted.)

(Signed) MOTHER."

Letter objected to by the defendants' counsel as incompetent and irrelevant and as not proved.

(Marked Exhibit Z Z.)

The further taking of testimony was adjourned with the statement it was probable no more testimony would be introduced.

441 In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

FRANK J. BOWMAN, Plaintiff,
vs.
WILLIAM F. PATRICK and JAMES M. PATRICK, Defendants.

Be it remembered that pursuant to the commission hereunto annexed, and on the ninth day of August, A. D. 1887, at my office, over the Carbonate National bank, in the city of Leadville, county of Lake and State of Colorado, before me, James B. Knoblock, a notary public in and for said Lake county, State of Colorado, duly appointed and commissioned to administer oaths, personally appeared before me, at the hour of two o'clock p. m. of said day, E. McGinniss, Esq., attorney for plaintiff, and C. C. Parsons, Esq., of counsel for the defendants, at which time and place the following proceedings were had, to wit:

E. McGinniss, Esq., offered in evidence a certified copy of the complaint in the case of William F. Patrick and others against the Iron Silver Mining Company, No. 3284, pending in the district court of the fifth judicial district, sitting within and for the county of Lake, State of Colorado, the original of which complaint or petition purports to be signed and sworn to by William F. Patrick. The purpose for which said complaint is offered in evidence, as stated by counsel for plaintiff, is to show the admission contained

in said complaint that the Col. Sellers and Accident mines
442 are of the value of one million dollars.

C. C. Parsons, Esq., of counsel for the defendants, admits the signature of said William F. Patrick to said complaint, and that it was verified by said William F. Patrick before James B. Knoblock, a notary public, on the 10th day of April, A. D. 1886, but objected to the introduction of said complaint as testimony in this case on the ground that the same is irrelevant and immaterial.

——— ———,
Attorney for Plaintiff.
C. C. PARSONS,
Attorney for Defendants.

STATE OF COLORADO, } ss:
County of Lake, }

I, James B. Knoblock, a notary public in and for said Lake county, in the State aforesaid, do hereby certify that the counsel for the respective parties hereinbefore named appeared before me this ninth day of August, A. D. 1887, at the hour of two o'clock p. m. of said day, at the city of Leadville, Lake county, Colorado, and that the proceedings were had before me as hereinbefore appears.

I do further certify that the complaint or petition hereinbefore referred to was introduced by counsel for plaintiff and is hereto attached and marked Exhibit "A."

I do further certify that I am neither of counsel or kin to either or any of the parties hereto and have no interest whatever in the result of this suit.

In witness whereof I have hereunto subscribed my name and affixed my seal of office this ninth day of August, A. D. 1887.

[SEAL.] JAMES B. KNOBLOCK,
Notary Public.

443 EXHIBIT A. James B. Knoblock, Notary Public.

STATE OF COLORADO, } ss:
County of Lake, }

In the District Court of the Fifth Judicial District, Sitting within and for the County of Lake, State of Colorado.

WILLIAM F. PATRICK, LYMAN ROBISON, T. C. STEBBINS, S. B. Morgan, John Livezey, Jr., J. C. Whiting, John J. Simmons, Samuel J. Glover, and A. J. Gerhardt, Plaintiffs,
vs.
THE IRON SILVER MINING COMPANY, Defendant. } Complaint.

The plaintiffs, complaining of the defendant, allege—

That the defendant company is a corporation organized under and by virtue of the laws of the State of New York and carrying on business in the county of Lake, State of Colorado.

That the plaintiffs at all the times mentioned herein and for a long

time prior hereto have been and now are the owners and tenants in common in fee by virtue of a patent from the Government of the United States therefor of, in, and to the Col. Sellers Lode mining claim and the Accident Lode mining claim, adjoining the said Col. Sellers Lode mining claim, situate in California mining district, county of Lake and State of Colorado.

That the plaintiffs for a long time prior hereto have been and now are engaged in working, mining, and extracting valuable gold, silver, and lead bearing ores from their said mining premises with a large force of men and have expended large sums of money
444 in so doing, and have at large expense purchased and erected upon said premises valuable and expensive machinery for the purpose of more effectually working, mining, and developing the same, and that said mining premises are only valuable for the mineral therein contained, and as mineral-producers are of great value to the plaintiffs and, as plaintiffs verily believe, of the value of one million dollars.

That the defendant, The Iron Silver Mining Company, claims to own or have some interest in that certain placer mining claim called and known as the Moyer placer mining claim, situate, lying, and being adjacent to the said Accident and Col. Sellers mines, situate in California mining district, county of Lake and State of Colorado.

That on or about the 8th day of April, A. D. 1886, the defendant company, by and through their servants, agents, and employees, commenced to run a certain drift from a point about sixty feet under ground from the top of a certain shaft sunk upon a portion of its so-called Moyer placer mining claim near the underground workings of the plaintiffs on their said Colonel Sellers and Accident mines in a southerly direction and in the direction of that certain stream of water called and known as the California Gulch stream, which flows down California gulch and is about sixty feet south from said shaft and to a certain extent flows through and divides the so-called Moyer placer claim.

And plaintiffs further, upon information and belief, aver that the avowed purpose and intent of the defendant company in so running said drift is not for the purpose of working and mining, but for the malicious purpose of connecting the said shaft with the waters of the said California Gulch stream and of maliciously diverting the said waters from ther natural channel in said stream, and thereby maliciously cause it to flow by means of said
445 shaft into the shaft claimed by the defendant, which said shaft is continuous to and within a short distance of the workings of the said Col. Sellers and Accident mines belonging to the plaintiffs, so that the said waters may be discharged into and upon the underground workings of both the said Col. Sellers and Accident claims and flood the same, and thereby, to the irreparable damage and injury of the plaintiffs, overflow and flood said workings, and thereby drive out and prevent the servants and employés of the plaintiffs from further operating, mining, and working their said mines and from extracting ore therefrom and from

operating their mining machinery, which the plaintiffs allege they have procured at large expense and are now operating, and which is essential to plaintiffs in operating, working, and mining their said property.

Plaintiffs further allege upon information and belief that the defendant company has already run said drift a distance of about fifteen feet and threaten to and will, unless restrained by order of this honorable court within a very short time, complete the running and extension of said drift to said California Gulch stream and divert the water therefrom as aforesaid and cause the same to overflow, as aforesaid, the said mining premises of the plaintiffs.

Plaintiffs further aver that if the said defendant be permitted to so as aforesaid divert the waters of said stream and cause the same as aforesaid to overflow and flood the workings of the mining premises of the plaintiffs as aforesaid, the said defendant will render valueless to plaintiffs its said mining premises, which are now of large value to plaintiffs as aforesaid, and will destroy the workings made by the plaintiffs upon their said mining premises at large expense, and will destroy and render useless to plain-
446 tiffs all their said machinery purchased as aforesaid by plaintiffs at large expense for the purpose of prosecuting work upon their said mining premises and developing the same, and will thereby work great, irreparable, and incalculable damage, injury, and mischief to the plaintiffs.

That the plaintiffs have no adequate remedy at law and the defendant company is unable to respond in damages for the injuries by it threatened as aforesaid if permitted to commit the same.

That this case is too urgent to admit of the delay incident to giving notice of this application for injunction, for that the defendant may, and the plaintiffs aver upon information and belief will, commit the acts and injuries herein complained of before the motion for injunctinn can be heard.

Wherefore the plaintiffs pray for a temporary writ of injunction restraining the defendant company and each and every of their servants, agents, and employés and all persons in privity with them from further extending the certain drift mentioned and described in the complaint herein to the California Gulch stream, and from diverting the water of said stream from its natural channel and causing the same to overflow and flood the workings or any thereof of the plaintiffs herein in the Col. Sellers and Accident mines, and from in any wise or manner interfering with the plaintiffs in the working and operation by them of their said mining premises, or from in any wise or manner interfering with or disturbing the possession of the plaintiffs therein, and that on a final hearing of the matters herein that said injunction be made perpetual.

And for such other and further relief as to this honorable court may seem meet.

THOMAS, PARSONS & LYLES,
Attorneys for Plaintiffs.

447 STATE OF COLORADO, } ss:
County of Lake, }

William F. Patrick, of lawful age, being first duly sworn, on oath says—

That he is one of the plaintiffs in the above-entitled action; that he has heard read the above and foregoing complaint and knows the contents thereof, and the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters that he believes it to be true.

WM. F. PATRICK.

Subscribed to in my presence and sworn to before me this tenth day of April, A. D. 1886.

[SEAL.] JAMES B. KNOBLOCK,
Notary Public.

Endorsed: Upon filing the within complaint and an undertaking in the sum of ten thousand dollars, with sureties to be approved by the clerk of this court, let temporary injunction issue as prayed for. L. M. Goddard, judge.

[Endorsed:] No. 3284. District court, Lake county, Colo. William F. Patrick *et al. vs.* The Iron Silver Mining Company. Complaint. District court, Lake county. Filed Apr. 10th, 1886. J. H. Playter, clerk, by Geo. P. Brown, deputy. Thomas, Parsons & Lyles, att'ys for plaintiffs.

STATE OF COLORADO, } ss:
County of Lake, }

I, Joseph G. Playter, clerk of the district court in and for said county, in the State aforesaid, do hereby certify the foregoing
448 to be a true, perfect, and complete copy of the complaint in the therein-entitled action, the same being numbered 3284 on the dockets of said court, and being the suit of William F. Patrick *et al. vs.* The Iron Silver Mining Company for an injunction, &c., &c., as the same now remains of record in my office.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at my office, in Leadville, this fourth day of August, A. D. 1887.

JOSEPH H. PLAYTER, *Clerk.*

STATE OF COLORADO, } ss:
County of Lake, }

I, Luther M. Goddard, judge of the fifth judicial district of the State of Colorado, do hereby certify that Joseph H. Playter, whose name is subscribed to the foregoing certificate of attestation, now is and was at the time of signing and sealing the same clerk of the district court of Lake county aforesaid (which county is in said judicial district) and keeper of the records and seal thereof, duly appointed and qualified to office; that full faith and credit are and of right ou-t to be given to all his official acts as such in all courts of record

and elsewhere, and that his said attestation is in due form of law and by the proper officer.

Given under my hand and seal this fourth day of August, A. D. 1887.

LUTHER M. GODDARD. [SEAL.]

STATE OF COLORADO, } ss:
County of Lake, }

I, Joseph H. Playter, clerk of the district court in and for said county, in the State aforesaid, do hereby certify that Luther M. Goddard, whose signature is appended to the foregoing certificate, was at the time of signing the same judge of the fifth judicial dis-
449 trict of the State of Colorado (of which judicial district the said *district* county forms a part), duly commissioned and qualified; that full faith and credit are and of right ought to be given to all his official acts as such in all courts of record and elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at my office, in Leadville, this 4th day of August, A. D. 1887.

[SEAL.] JOS. H. PLAYTER, *Clerk.*

In the Circuit Court of the United States, Eastern Subdivision, Eastern District of Missouri.

FRANK J. BOWMAN }
vs. } In Equity. No. 2732.
W. F. PATRICK *et al.* }

Testimony of a witness taken in the above-entitled cause by consent of parties, before George Brown, a commissioner of the circuit court of the United States for the eastern district of Missouri, on the 16th day of July, 1887, at his office, 509 Olive street, city of St. Louis, Missouri, on behalf of the plaintiff.

Present: E McGinness, Esq., for plaintiff; E. C. Eliot, Esq., for defendants.

EDWARD CUNNINGHAM, Jr., having been duly sworn on the part of the plaintiff, testified as follows.

Direct examination by Mr. MCGINNESS:

450 Q. I will ask you to look at a letter dated Leadville, June 28, 1882, addressed to F. J. Bowman and signed "William F. Patrick," and ask you if you know in whose handwriting that letter is and whose is the signature.

A. I believe the letter and signature to be in the handwriting of William F. Patrick. I am not able to state absolutely, having a somewhat limited acquaintance with Mr. Patrick's handwriting. I have, however, seen it more than once before, and from such familiarity as I have with it I am testifying.

Counsel for plaintiff offers in evidence the paper referred to, and it is marked "Plaintiff's Exhibit No. 27."

Defendants object to the introduction of this letter in evidence on the ground that it is incompetent and irrelevant to the issues.

It is agreed that the commissioners may make a copy of this paper and attach it in place of the original. Said copy (*verbatim et literatim*) is hereto attached, marked "Plaintiff's Exhibit 27 (copy)."

Q. I now show you a paper the first five lines of which read as follows: "Memorandum of agreement made and entered into this — day of ——, A. D. 1882, by and between Frank J. Bowman, of the city of St. Louis, State of Missouri, and William F. Patrick, of the city of Leadville," and which concludes as follows: "In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written." Two seals, "W. F. Patrick" signed opposite the lower one; then "witness as to Patrick, E. A. Reynolds," and ask you if you know in whose handwriting the signature "W. F. Patrick" to that instrument is.

A. I would say that from such familiarity as I have already stated I have with Mr. Patrick's signature I believe this to be the signature of William F. Patrick.

451 Counsel for plaintiff offers in evidence the paper last spoken of, and it is marked Plaintiff's Exhibit 28.

Defendants object to the introduction of this paper in evidence on the ground that it is incompetent and irrelevant, it does not appear from what custody it comes, or that it is not a mere copy of some other instrument, and further on the ground that it does not appear that this instrument was ever executed or completed for any purpose whatsoever.

It is agreed that the commissioner may make a copy of this paper and attach it in place of the original. Said copy (*verbatim et literatim*) is hereto attached, marked "Plaintiff's Exhibit 28 (copy)."

Q. Do you know where Mr. F. J. Bowman, the plaintiff, now is?

Counsel for defendant objects as incompetent and irrelevant.

A. I do not.

Q. What is your best information as to his present residence and whereabouts?

A. I have no knowledge or information on that subject whatsoever, except through a statement of plaintiff's counsel, Mr. E. McGinness, made to me to-day. Mr. McGinness stated to me this morning that Mr. Bowman was living in the city of New York.

Q. And is not now present in St. Louis?

A. And that he is not to-day present in St. Louis; but I have no knowledge whatever further than this statement of Mr. McGinness, which I don't wish to be understood as doubting in anywise.

Q. What is your relation to this case?

A. I am of counsel for defendants.

(No cross-examination.)

Signature waived.

452 UNITED STATES OF AMERICA,
State of Missouri, Eastern Division, Eastern District, } ss:

I, George Brown, a commissioner of the circuit court of the United States for the eastern district of Missouri, hereby certify that the foregoing testimony of Edward Cunningham, Jr., was taken by consent of parties before me on behalf of plaintiff in the above-entitled cause on the 16th day of July, 1887, in my office, 509 Olive street, city of St. Louis, Missouri; that there were present on behalf of plaintiff E. McGinness, Esq., and on behalf of defendants E. C. Eliot, Esq.; that the witness was of sound mind and lawful age and was duly sworn by me to testify the whole truth; that by consent of parties said testimony was reduced to writing in short-hand in the presence of the witness and from his statements; that said counsel waived the signature of the witness to my transcript of said short-hand notes so taken; and I further certify that the foregoing is a true transcript of said short-hand notes.

I further certify that I am not of counsel or attorney for either of the parties in said deposition or caption named, or in any way interested in the event of said cause.

In testimony whereof I hereunto set my hand and seal this 18th day of July, 1887.

[SEAL.] GEO. BROWN,
Commissioner U. S. Circuit Court.

PLAINTIFF'S EXHIBIT 27 (COPY).

130 W. 6TH ST., LEADVILLE, *June* 28, 1882.

Mr. F. J. Bowman, St. Louis, Mo.

453 DEAR SIR: I saw Syles this afternoon he tells me that he bid the engine-hoister &c. in for the Colo. P. Co. for $1,600. That the Page & Blow judgment and costs amounts to $309. He says that he does not think we can get the title in the manner we proposed in that judgment as there is apt to be some one present who will bid up the personal property to more than enough to satisfy their judgment. I told him I would write to you and explain the matter. I think Syles did the best he knew but did not understand our object in bidding at the sale.

I saw Bryden to-day. He has attached the property of the Colo. P. for the amount due him $750.00. He suggested that if the consolidation was effected he could release in his attachment all the personal property and let it lie in the realty only. Syles doubted whether that could be done as he thought it beyond the power of a creditor to release after the levy had been made.

Have heard nothing from Flinn or Patterson. Please let me know what we are to do in this new complication, and also about the Col. Sellers as I am anxious to continue work on that property and see what is there.

Yours truly, W. F. PATRICK.

PLAINTIFF'S EXHIBIT 28 (COPY.)

Memorandum of agreement made and entered into this — day of —— A. D. 1882, by and between Frank J. Bowman, of the city of St. Louis, State of Missouri, and William F. Patrick of the city of Leadville, State of Colorado, witnesseth:

That whereas said above-named parties did on the 17th day of February, A. D. 1882, enter into a certain contract in writing with Theodore C. Stebbins, Lyman Robison, Samuel J. Glover and Harvey Howard, by the terms of which written contract the said Bowman
454 and Patrick in consideration of the conveyance to them by said Stebbins and others above named of the undivided one-half right, title and interest in and to the "Col. Sellers Lode" and the Accident Lode mining claims, agreed to sink a shaft upon one of said mining claims to pay mineral or limestone in place and whereas considerable work and development has been done and performed on said Col. Sellers and the expense thereof has been borne principally by said Patrick and said Bowman is unwilling to continue said work or pay any of the cost thereof. And whereas on the 19th day of June, 1882, said Bowman executed and delivered to said Patrick his certain promissory note of that date for the sum of two hundred and eighty-eight dollars and seventy cents due 90 days after date and bearing interest at the rate of eight per cent. per annum, which note was for the said Bowman's proportionate share of the cost and expenses of working said Col. Sellers lode and which had theretofore been paid by said Patrick and whereas said Patrick has negotiated and sold said note. Now therefore it is hereby agreed by the parties that if said Patrick will pay said note when the same becomes due and save the said Bowman from the payment of the same or any portion thereof, the said Bowman will release and surrender to said Patrick all his right, title and interest in and to the above-described contract so made with said Stebbins and others and to the property described therein. The said Bowman further agrees that in the payment of said note and the surrender of the same to him, to execute and deliver to said Patrick a good and sufficient deed of conveyance of his right, title and interest in and to the mining property described in said contract and known as the "Col. Sellers" and "Accident" Lode mining claims situated in California mining district, Lake county Colorado. And the said Patrick agrees on his part upon such conveyance to him to release
said Bowman from any and all liability under said contract
455 so made with said Stebbins *et al.* and to save said Bowman from any and all such liability.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

—— ——. [SEAL.]
W. F. PATRICK. [SEAL.]

Witness as to Patrick:
E. A. REYNOLDS.

Endorsement or backing on paper when folded:
"Agreement between Frank J. Bowman and William F. Patrick."

In the Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri, Sitting at St. Louis.

FRANK J. BOWMAN, Plaintiff,
vs.
WILLIAM F. PATRICK and JAMES M. PATRICK, Defendants.

Be it remembered that pursuant to the stipulation hereunto annexed, beginning on the twenty-first day of November, A. D. 1887, at the hour of ten o'clock a. m. of said day, and ending on the third day of December, A. D. 1887, at the law office of Thomas, Parsons and Lyles, in the city of Leadville, county of Lake and State of Colorado, before James B. Knoblock, a notary public in and for said county of Lake, in the State of Colorado, duly appointed and
456 commissioned to administer oaths, personally appeared before me Alfred H. Boyd, John D. Drummond, O. H. Harker, C. C. Parsons, William F. Patrick, James M. Patrick, Lyman Robison, and Frank G. White, witnesses produced on behalf of the defendants in the above-entitled action, now pending in said court, who, being each by me first duly sworn, were, on said day and at the times hereinafter stated, examined and interrogated by C. C. Parsons, Esq., of counsel for defendants, and by E. McGinnis, Esq., of counsel for the plaintiff, and testified as follows:

In the Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri.

FRANK J. BOWMAN, Plaintiff,
vs.
WILLIAM F. PATRICK and JAMES M. PATRICK, Defendants.

Depositions taken on behalf of the defendants at the law office of Thomas, Parsons and Lyles, in the city of Leadville, county of Lake and State of Colorado, beginning on the twenty-first day of November, A. D. 1887, at the hour of two o'clock p. m. of said day.

The taking of said depositions was by agreement of the parties proceeded with, notice of the time and place of taking the same being waived by counsel for the plaintiff, the same to be taken before James B. Knoblock, a notary public within and for the county of Lake and State of Colorado, by agreement of the parties hereto and under the stipulation heretofore made, all objections to the official character of said Knoblock and to his competency to take said testimony being hereby waived.

457 Present: E. McGinnis, Esq., counsel for plaintiff, and C. C. Parsons, Esq., of counsel for defendants.

WILLIAM F. PATRICK, one of the defendants, being first duly sworn according to law, testified as follows:

Direct examination by C. C. PARSONS, Esq.:

1 Q. State your name, age, residence, and occupation.

A. William F. Patrick; age, thirty-four; residence, Leadville, Colorado; engaged in mining.

2 Q. Are you the William F. Patrick, one of the defendants in this suit?

A. Yes.

3 Q. Are you acquainted with your codefendant, James M. Patrick?

A. Yes; he is one of my brothers.

4 Q. Are you acquainted with the plaintiff in this case; and, if so, how long have you known him?

A. Yes; I am acquainted with Frank J. Bowman; met him first in St. Louis in September or October, 1881.

5 Q. Do you know the Col. Sellers and Accident Lode mining claims; and, if so, how long have you known them?

A. Yes; I know them; have known of them; first heard of them in February, 1882, and I have been identified with them ever since.

6 Q. Where are said claims located?

A. They are located on Iron hill, California mining district, Lake county, Colorado.

7 Q. How far from the city of Leadville?

A. About a mile and a half or two miles.

8 Q. Are they situate in what is known as California gulch?

A. Yes.

9 Q. How did you first get acquainted with the mining claims that I have mentioned?

A. The first I heard of these claims was in February, 1882; they were called to my attention by Frank J. Bowman.

458 10 Q. The plaintiff in this suit?

A. The plaintiff in this suit; yes, sir.

11 Q. Where and under what circumstances?

A. Bowman and myself were in Leadville at the time attending to some other business, and he heard of these claims through—I think first through William H. Wilson, of Leadville; called his attention to them, and we went up California gulch to look at some other claims and at the same time Wilson called his attention to those two.

12 Q. How do you know that Bowman's attention was called to the claims named by William H. Wilson?

A. Bowman told me so afterwards.

13 Q. Was anything said by Bowman as to what claims adjoined these claims?

A. Yes; he gave me a description of the locality. He said it was near the A. Y. mine, in California gulch.

14 Q. What did you say to him in answer to his statement that

he had learned of these claims and suggested that you take hold of them?

A. I told him I would look into them. If I was pleased with the prospect I would go into it.

15 Q. State whether or not your first called his attention to this property.

A. No, sir.

16 Q. Did you know anything of them before your attention was called to them by the plaintiff?

A. No; I first heard of them through Frank J. Bowman.

17 Q. In that conversation or in any conversation prior to the making of the contract of February 17th, 1882, did you make any statement to Frank J. Bowman as to your special qualifications as a miner?

A. No, sir.

18 Q. Or as to your being a State assayer or that you were specially or otherwise expert in the matter of mining?

A. No; I made no such representation. About that time
459 I did think of applying to the Treasury Department for the position of assayer in charge of the assay office in Denver. I may have mentioned that to him, but that is all. I never made the application, though.

19 Q. State where the conversation that you have mentioned as having been had with the plaintiff was held.

A. It was held in Leadville partially and partially in Denver. We went from Leadville to Denver together at the same time in February.

20 Q. At this time did you have any other business connection with the plaintiff in regard to any other mining interests or any other business of any character whatever?

A. Yes; in February we had some business. We came out here with business connected with the St. Louis mine, on Breece hill.

21 Q. In this county?

A. Yes; in Lake county, Colorado. He was acting as attorney for me in that matter; had been ever since I employed him, in October, I think it was, in 1881. We made our first trip to Denver together in the last of November, and I remained out here and he returned to St. Louis. The next time I saw him, I think, was about the 10th or 12th of February, 1882, and we came to Leadville and Denver together again on the same business.

22 Q. What property had you- business with the plaintiff reference to other than the Col. Sellers and Accident claims?

A. At that time it was in regard to—simply to the St. Louis claim, as I stated, on Breece hill, in this county. He was acting as attorney for me, trying to effect certain compromises and consolidations. The St. Louis mine at that time was covered by the Colorado Prince and Miner Boy locations and the owners of the St. Louis location were in some trouble among themselves, and I employed Bowman to try to straighten out these matters and effect a consolidation and get things in shape and organize a new company.

460 23 Q. When you say the St. Louis mining claim was covered by the Colorado Prince and Miner Boy, do you mean that they had surveyed across you so as to raise conflicts with you for the same ground?

A. Yes; they surveyed across and in fact took all of the St. Louis claim.

24 Q. What were the terms upon which you employed the plaintiff to effect a compromise and consolidation that you have spoken of in regard to the St. Louis mine?

A. My agreement with Bowman was that I should pay all traveling expenses that he might be put to, and in addition to that he was to have a certain fee if that matter was settled as we expected to settle it. He was to have a certain amount of the stock.

25 Q. Do you mean that his fee was to be taken in stock of the company that was to be organized for the consolidation and compromise?

A. Yes.

26 Q. Have you stated all of the matters involved in your business relations with Frank J. Bowman up to the 17th of February, 1882, exclusive of the Col. Sellers and Accident mining claims?

A. At the same time I think he asked me to look at a claim upon a mine that was up on Bald mountain; I think it was called the Green Mountain Boy; something of that kind; to look at it for him; make a report upon it. He also wanted some examinations made of the McDermith placer, which lies just above the town of Oro.

27 Q. About how far from Leadville?

A. About three miles from Leadville.

28 Q. Had you any interest in the Green Mountain Boy claim and McDermith placer at that time?

A. No; none at all.

29 Q. You were simply to examine these properties and report to him for his accommodation?

A. That is all.

30 Q. Now, have you stated all the——

461 A. Yes; at the same time I made some inquiries. I do not know as I made any examination of the Giit Edge mine at Bowman's request.

31 Q. Have you no- stated all of the business matters that you had with Bowman exclusive of the Col. Sellers and Accident claims up to February 17th, 1882?

A. Yes; that was all the business I had with him; those little matters.

32 Q. What was the result of your negotiation with the plaintiff that was commenced first, you say, some time in February, 1882, concerning the Col. Sellers and Accident mining claims?

A. It resulted in the contract of the 17th of February, 1882, with T. C. Stebbins, Lyman Robison, Harvey Howard, and Samuel J. Glover.

33 Q. When and where did you and the plaintiff come to an agreement as between yourselves and enter into this contract of February 17th, 1882?

A. We agreed upon it a few days before the 17th of February, in Leadville or Denver, I am not positive which. At that time Mr. Bowman drew up a pencil memorandum of the contract that he wished to enter into with these gentlemen and submitted it to me. I looked it over and thought it was all right, and he asked me to submit it to T. C. Stebbins and Lyman Robison, who were the only rosident owners of the Col. Sellers and Accident mining claims in Leadville at that time. I did so on my return to Leadville, which was about a few days. I only stayed in Denver a few days. I do not remember the exact date. They examined the pencil memorandum, and we went together to the office of C. C. Parsons, and the contract of the 17th of February, 1882, was drawn on that day, February 17th, from this pencil memorandum, which was prepared by Frank J. Bowman.

34 Q. Who drew the contract of the 17th of February, 1882, which was finally signed by all the parties?

A. C. C. Parsons.

35. Q. I now hand you a contract, dated the 17th of Feb-
462 ruary, 1882, purporting to be an agreement by and between Theodore C. Stebbins, Lyman Robison, Samuel J. Glover, and Harvey Howard, parties of the first part, and William F. Patrick and Frank J. Bowman, parties of the second part, which contract is signed by the parties that I have named, and acknowledged on the 17th of February, 1882, 6th of March, on the 8th of March, and the 13th of March, 1882, and ask you to examine the same and state whether or not that is the original contract made between the parties that I have named and under which you and the plaintiff made your partnership arrangemeut for the purpose of working the Col. Sellers and Accident claims.

A. Yes; that is the original contract.

36 Q. Is that the contract signed by you and the plaintiff that constituted your agreement with the owners of the Col. Sellers and Accident mining claims?

A. Yes, sir.

Counsel for the defendants now offers in evidence the contract mentioned in the last question propounded to the witness and asks that the same be marked Defendants' Exhibit "A," which is in the figures and words following, to wit:

"This agreement made and entered into this 17th day of February A. D. 1882, by and between Theodore C. Stebbins, Lyman Robison, Samuel J. Glover and Harvey Howard, parties of the first part and William F. Patrick of Leadville Colorado and Frank J. Bowman of St. Louis, Missouri parties of the second part. Witnesseth,

"That whereas the parties of the first part own certain mining claims, lodes, ledges, veins or deposits known and designated the Col Sellers and Accident lodes, situated in the California mining district, Lake county Colorado and particularly described in a certain deed of conveyance this day executed by the parties of the first part conveying an undivided one-half of said property to the parties

of the second part for the expressed consideration of five
463 thousand dollars and which said deed has this day been deposited in escrow with C. C. Parsons to be delivered to the parties of the second part when they shall have sunk a good and substantial shaft in and upon said premises to limestone in place or bed rock, unless pay mineral is found in said shaft before reaching the limestone in place or bed rock. Said shaft shall be not less than eight feet by four feet in the clear and shall be well timbered and constructed in a good workmanlike manner.

"It is also agreed by the parties of the second part that the work of sinking said shaft shall be commenced within thirty days from this date and continued with no intermissions exceeding ten (10) days at any one time (unless the inclemency of the weather shall prevent) until pay mineral or limestone in place is reached. The parties of the second part further agree to make application for a patent title to said mining claims and to pay all the costs and expenses of every description incident to and growing out of said application until patents therefor have been obtained. The work of procuring patents on said claims shall be commenced within sixty days from this date and shall be diligently prosecuted until patents have been obtained. It is further agreed that any failure on the part of the party of the second part to so sink said shaft or prosecute said applications for patent shall work a full forfeiture of their rights under this contract. And on the part of the said parties of the first part it is agreed that the said one-half interest so conveyed, is and shall remain free from all liens or encumbrances. It is also agreed by the parties hereto that any machinery or shaft-houses placed upon the said property one-half of the cost of the same shall be taken from the first product of the mine; Provided however, that if no mineral is found therein the machinery shall remain the property of the said parties of the second part.

464 "In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

THEODORE C. STEBBINS.	[SEAL.]
LYMAN ROBISON.	[SEAL.]
HARVEY HOWARD.	[SEAL.]
SAMUEL J. GLOVER.	[SEAL.]
WM. F. PATRICK.	[SEAL.]
FRANK J. BOWMAN.	[SEAL.]

"STATE OF COLORADO, }
"*County of Lake,* } *ss:*

"I, James R. Hammond, a notary public in and for said county and State aforesaid, do hereby certify that Theodore C. Stebbins, Lyman Robison, and William F. Patrick, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and pur*pur*poses therein set forth.

"In witness whereof I have hereunto set my hand and notarial seal this 17th day of February, A. D. 1882.

"J. R. HAMMOND,
"*Notary Public.*

"STATE OF MISSOURI, }
"*City of St. Louis,* } *ss:*

"Be it remembered that on this 6th day of March, 1882, before me, a notary public within & for the city of St. Louis & State of Missouri, came Frank J. Bowman, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, and he acknowledged the same to be his act & deed for the purposes therein mentioned.

"In testimony whereof I have hereunto set my hand & notarial seal the day & year last above written.

"GEO. P. WOLFF,
"*Notary Public, City of St. Louis, Mo.*

"My commission expires June 27, 1885.

465 "THE STATE OF OHIO, }
"*Wayne County,* } *ss:*

"I, Lucas Flattery, a notary public within and for said county, hereby certify that Harvey Howard, — is president of the Wooster Mining Company, personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing, appeared before me this day in person and acknowledged that he signed and sealed the foregoing instrument as his free and voluntary act and deed for the purposes therein expressed.

"In witness whereof I have hereunto set my hand and notarial seal this 8th day of March, A. D. 1882.

"LUCAS FLATTERY,
"*Notary Public.* [SEAL.]

"STATE OF ILLINOIS, }
"*County of Cook,* } *ss:*

"I, Chalkley B. Hambleton, a notary public in & for said county of Cook, in the State of Illinois, do hereby certify that Samuel J. Glover, personally known to me as the same person whose name is subscribed to the foregoing instrument of writing, appeared before me this day in person and acknowledged that he signed, sealed, and delivered said instrument as his free and voluntary act and deed for the uses and purposes therein set forth.

"In witness whereof I have hereunto set my hand and notarial seal this 13th day of March, A. D. 1882.

"C. J. HAMBLETON,
"*Notary Public.*" [SEAL.]

(Endorsed on back:) "40676. Theo. C. Stebbins *et al.* to William F. Patrick *et al.* Agreement. State of Colorado, county of Lake, *ss:* Filed for record at 12 o'clock m., March 16, 1882, and duly recorded

in Book 72, page 493. J. W. Jacque. Fees, 3.00. T. W. Burchinell, deputy."

37 Q. State whether or not at the time that this agreement
466 marked Defendants' Exhibit "A" was made there had been a discovery of mineral in rock in place or otherwise on either the Col. Sellers or Accident mining claims.

A. No; there had not.

38 Q. I will call your attention to one of the stipulations in this contract which provides "that when the parties of the second part shall have sunk a good and substantial shaft in and upon said premises to limestone in place or bed rock, unless pay mineral is found in said shaft before reaching the limestone in place or bed rock, that the parties of the second part shall be entitled to a deed for one-half of said claim," which deed was executed contemporaneously with said contract, and ask what the object was in providing that he should sink to limestone in place or bed rock before striking mineral in place, before reaching the bed rock.

A. In this district, at least in this camp, the mineral lies between porphyry as a hanging wall and limestone as a foot wall. Sometimes that is termed (the little division between the limestone and porphyry) a contact; sometimes that contact is barren; there would be no mineral lying between the limestone and porphyry, and in order to provide against that contingency I made it, I had that clause inserted in there so that I was to be entitled to a deed whether we struck mineral or simply a barren contact.

39 Q. Do I understand that if you had sunk the shaft to limestone or bed rock and without discovering mineral, that that would be evidence to you that it would be useless to sink further for the purpose of obtaining mineral in that shaft?

A. That was the theory at that time.

40 Q. Was that generally so in this camp at that time?

A. Yes, sir.

41 Q. You may now state how soon after the execution of this contract marked Exhibit "A" by all the parties thereto, and
467 its delivery to you, you commenced work on either the Col. Sellers or Accident claims under this contract.

A. I commenced work as soon as the contract was returned to me. It had to be forwarded to different places for signatures—to these different individuals, Bowman, at St. Louis, and Harvey Howard, at Wooster, Ohio; Glover, in Chicago. It took several weeks for it to make the rounds. It was returned to me about the 14th of March. I commenced on the 15th of March. I took a surveyor up to the ground and run the line between the Minnie and Col. Sellers claims and chose a place in which to commence sinking the shaft.

42 Q. Now you may state what arrangement was made between you and the plaintiff for the sinking and development of the Col. Sellers and Accident mining claims under the contract known as Defendants' Exhibit "A."

A. When Bowman was here in February we agreed upon the main points of this: The understanding was that I should remain

in Leadville, take charge of this work—the work of sinking this shaft on the Col. Sellers claim—and was to let the contracts and superintend it generally.

43 Q. What was he to do, if anything?

A. He was to sign this contract when it was sent to him, and we were each to pay one-half of the expenses for sinking this shaft to pay mineral or limestone.

44 Q. Were you to receive any compensation for your services in the furtherance of the partnership interest under this contract, Exhibit "A"?

A. No; I was not.

45 Q. Was it understood that he was to perform any legal services growing out of or incident to the performance of this contract of February 17th, 1882?

A. No; there was at that time—we did not anticipate any legal trouble in the performance of this contract.

46 Q. Was anything said about any services to be rendered by the plaintiff as an attorney or counsellor at law?

468 A. No; there was not—not about this matter.

47 Q. What was the arrangement, if any arrangement was made, as to the manner in which the costs and expenses of the performance of this contract, Exhibit "A," was to be paid by you and by Bowman, the plaintiff?

A. The only arrangement was that I was to inform Bowman from time to time of expenses when they would mature, when they would become due, and he was to remit to me from time to time as I notified him.

48 Q. What was he to remit to you?

A. He was to remit to me one-half the expenses that had been incurred up to the time I notified him.

49 Q. Was there any understanding between you and the plaintiff that in consideration of your managing the property here and looking after the sinking of the shaft and other work that was to be done by you and Bowman under said contract that the plaintiff was to render legal services for you in other matters in which you were interested?

A. No, sir; that was all provided for in the contract which we made in the fall of 1881.

50 Q. Now you may state when, if at all, you commenced work under said contract on the Col. Sellers and Accident mining claims.

A. I commenced work, as I stated, on the 15th of March—that is, I took the surveyor up there, run this line out and chose this place to sink the shaft.

51 Q. And chose the place where the shaft should be sunk?

A. Yes.

52 Q. Does the Minnie mining claim adjoin or side-line with the Col. Sellers?

A. Yes; it side-lines on the—that is, the Minnie lies just west of the Col. Sellers, side-lines with it.

53 Q. What was the next thing done in the performance of the

contract, Exhibit "A," after the survey was made and the place located at which to sink the shaft?

469 A. While this contract of February 17th was on its rounds for signatures I asked for bids of several parties to sink the shaft the first hundred feet—that is, from the surface to the depth of one hundred feet. I received several, and I finally awarded the contract to J. D. Drummond at the rate of $10.00 per foot. When the contract was returned to me with all the signatures on it I notified him (Drummond), and he went and procured his tools; took an express wagon and went to the Col. Sellers claim with them, and was about to begin work when he saw there were some other parties on the ground, and they notified him that he could not work there, that they had jumped the ground, and he left his tools there and returned to town and told me of this occurrence, and myself and Stebbins and Robicon we had a little consultation in regard to it, and we went to see our attorney, C. C. Parsons, and we made complaint against them for unlawfully taking possession of the ground and holding it by force, and had them arrested under the complaint, and the constable went up and brought them down, and they were tried before a justice of the peace, T. M. O'Brien, and were bound over to appear before the grand jury.

54 Q. They were bound over to await the action of the grand jury, were they?

A. Yes.

55 Q. What became of the prosecution afterwards?

A. We afterwards——

56 Q. They were indicted by the grand jury?

A. Yes; they were indicted by the grand jury, and before the case came on for trial we had it set aside or nollied.

57 Q. Had the indictments nollied?

A. Had the indictments nollied.

58 Q. Under what understanding or agreement?

A. On the agreement that we should go to work there peaceably, and at the same time the jumpers go to work and see which

470 made the first discovery of mineral, and while these parties were under arrest our contractor commenced work there, and when these jumpers, as we call them, went back they also commenced work, and it became a race for mineral.

59 Q. What was the name of the claim located by those whom you call the jumpers?

A. They called it the Little Hope.

60 Q. Had they begun to sink a shaft on the Little Hope location at the time that you had them arrested?

A. Yes; they just commenced; they were down a few feet only.

61 Q. Did the Little Hope location cover any of the ground of the Col. Sellers and Accident locations?

A. Yes; it covered most of the Col. Sellers and Accident, with the exception of about one hundred and fifty or two hundred feet on the south end of the Col. Sellers and Accident claims.

62 Q. What, if anything, was agreed upon with the jumpers at

the time that the indictments against them were nollied as to leaving each party to their civil remedy?

A. It was understood that suits would be commenced and the title to the ground tried in the district court.

63 Q. How far as the shaft of the Little Hope location which was being sunk by the jumpers, or owners of the Little Hope location, from the shaft that had been located and work commenced thereon by the contractor on the Col. Sellers claim?

A. About one hundred and twenty-five feet east.

64 Q. You say you made a contract for the sinking of the shaft one hundred feet deep to J. D. Drummond at $10.00 per foot?

A. Yes, sir; the contract was that; in addition to that, I was to pay for the timbers—that is, for the lumber that was used in the shaft.

65 Q. When you say "I" do you mean yourself?

A. Bowman and myself in this contract.

471 66 Q. You say that your contractor commenced work while the jumpers were under arrest. Now, can you fix the date when your contractor commenced sinking the shaft on the Col. Sellers under the contract for one hundred feet?

A. On the 18th of March, as I remember.

67 Q. Do you know why the compromise that you have mentioned as having been made with the jumpers and which resulted in the nollying of the indictments against them was made instead of pushing this criminal action against them?

A. Yes. It was made on the advice of our attorneys, C. C. Parsons, acting, and Col. J. B. Bissell. They advised——

68 Q. Advised who?

A. Advised myself, Robison, and Stebbins that we could not make the action lie, as no discovery of mineral in rock in place had been made on either the Col. Sellers or Accident at that time.

69 Q. And for that reason, that you had no valid discovery?

A. Yes; no valid discovery.

70 Q. Then, when the work began on your shaft and on the shaft of the jumpers at the same time, how were you advised as to the effect of the first discovery of mineral by either party?

A. We were advised that the party who made the first actual discovery of mineral would have the better title to the ground. For that reason we pushed the work of sinking this shaft as rapidly as possible.

71 Q. How rapidly and how diligently and with what force of men did you- contractor work in the sinking of the shaft on the Col. Sellers mining claim after the settlement or compromise with the jumpers that you have mentioned?

A. He worked right along all the time, day and night, with, I think, three shifts of men.

72 Q. What is meant by three shifts of men?

A. That is, working eight hours each.

472 73 Q. So that working day and night there would be three shifts in every twenty-four hours of work?

A. Yes.

74 Q. Now you may state whether or not you had any difficulties in the way of litigation or otherwise with the owners of the Little Hope location after the work was commenced on the shaft of the Col. Sellers and during the time that you were engaged in the race for mineral with the locators of the Little Hope location.

A. Yes; there were a number of suits commenced. We, Stebbins, Robison, and other owners of the Col. Sellers, commenced a suit, as I remember, against the locators of the Little Hope. I made an application for patent under this contract of February 17th, 1882, as we had agreed to do, Bowman and myself, and had the survey made, made application for patent, filed it in the land office at Leadville, and at the end of the sixty days then these jumpers commenced an adverse suit against us.

75 Q. Do you mean at the end?

A. During the time they filed this adverse suit, and later on, in the year 1883, they made application for injunction to stop our working there.

76 Q. They never pressed that for hearing?

A. No.

77 Q. What other trouble did you have with any parties involving time and expense during this race for mineral between yourselves and the jumpers?

A. About the 16th of May, 1882, these contractors had finished their first hundred feet, and we stopped work a day or two in order to get a hoister on the ground, and one night the shaft was blown up by giant powder. That involved a delay of ten days or two weeks in getting that straightened out. It was supposed that the jumpers had blown the shaft up, although we were never able to prove it.

78 Q. For what purpose?

A. To delay the work and delay our work as much as possible, so that they could beat us to mineral.

473 79 Q. How, if you know, did the jumpers get into your shaft for the purpose of placing giant powder there if you were working three shifts of men?

A. We had stopped, as I said, to put this machinery on.

80 Q. The hoister?

A. Yes; this hoister. We were down about as deep as we could work it economically with a windlass and we stopped in order to get this hoister on.

81 Q. Did you afterwards learn by any means that the responsibility for the blowing up of your shaft attached to these jumpers or locators of the Little Hope lode?

A. Yes; one of them afterwards confessed that they had done it; had instigated it.

82 Q. Now, you may state whether or not, at any time after the execution and delivery of the contract known as Defendants' Exhibit "A," the plaintiff, Frank J. Bowman, assigned or transferred any of the interest in said contract to any person; and, if so, to whom.

A. Yes; on the 6th of May Frank J. Bowman transferred a fourth of his interest to William H. Wilson, of Leadville.

83 Q. Where did that assignment take place and in whose presence?

A. That assignment took place in my house, in Leadville, Colorado—130 West 6th street I was living at that time—in my presence.

84 Q. Who else was there at that time?

A. Frank J. Bowman and William H. Wilson.

85 Q. Was the contract in writing?

A. Yes, sir.

86 Q. Who drew that contract?

A. It was drawn by Bowman.

87 Q. In whose presence?

A. In the presence of Wilson and myself.

88 Q. Who signed the contract?

A. Frank J. Bowman and William H. Wilson.

89 Q. What was said by the plaintiff, if anything, at the time that that contract was drawn at your house and in your
474 presence?

A. Bowman said to me, "I will take care of this; you need not give up any of your interest. I will let it go out of mine."

90 Q. Was that contract delivered at that time?

A. Yes, sir.

91 Q. In your presence?

A. Yes.

92 Q. By whom to whom?

A. Delivered by Frank J. Bowman to William H. Wilson.

93 Q. Was anything said by William H. Wilson concerning said assignment in your presence and in the presence of the plaintiff?

A. Wilson before this made some demand upon Bowman for this contract. He said that he had introduced the parties, meaning Stebbins and Robison, called Bowman's attention to the Col. Sellers and Accident claims, and he felt he ought to have something—to have a small interest in it. This conversation was substantially repeated that morning, as I remember.

94 Q. I now hand you a paper-writing purporting to be a memorandum of agreement made the 6th day of May, 1882, by and between Frank J. Bowman and William H. Wilson and signed by said last-named parties and ask you in whose handwriting is said paper.

A. It is in the handwriting of Frank J. Bowman.

95 Q. The writing in black ink?

A. In black ink; yes.

96 Q. In whose handwriting is the signature thereto—Frank J. Bowman?

A. Frank J. Bowman's signature.

97 Q. And whose signature is the one William H. Wilson?

A. That is William H. Wilson's signature.

98 Q. In whose handwriting is the face of the paper in red ink?

A. It is in the handwriting of John Livezey, Jr.

99 Q. You may now examine the handwriting on the back of said paper and state in whose handwriting that is.

A. Both of these are in the handwriting of William H.
475 Wilson; one of them has been erased.

100 Q. In whose handwriting is the name William F. Patrick?

A. That is my signature. I witnessed that.

101 Q. Now, I will ask you if that is the paper that was executed and delivered by the plaintiff to William H. Wilson at the time that you have stated and in your house and in your presence.

A. Yes; that is the paper.

Counsel for defendants now offers in evidence the memorandum of agreement dated the 6th of May, 1882, and upon which an assignment dated Leadville, Colorado, May 11th, 1882, from William H. Wilson to John Livezey, Jr., is endorsed, and asks that the commissioner mark the same Defendants' Exhibit "B," which is in the words and figures following, to wit:

"This memorandum of agreement, made this 6th day of May, A. D. 1882, by and between Frank J. Bowman and Wm. H. Wilson, witnesseth:

That in consideration of services rendered and as full compensation therefor in the matter of securing a contract with T. C. Stebbins & Lyman Robison with Patrick & Bowman, for sinking a shaft on the 'Col. Sellers & Accident' *loads*, & securing a patent therefor for a one-half interest in said *propertys*, it is now therefore agreed between the parties hereto that said Wilson shall have a one fourth of said Bowman's interest, *i. e.*, a one-eighth of said contract, said Wilson paying his proportionate share of all expenses incurred under said contract, payment to be made within ten days after receiving from said Patrick notice of the amount due, & failure to so do shall work a full forfeiture of this contract. Time of payment as above being by agreement the essence of this contract.

FRANK J. BOWMAN.
W. H. WILSON."

(The endorsement across face in red ink is as follows:)

476 "Leadville, Col. This contract satisfied by deed from Frank J. Bowman to W. F. Patrick for his (Bowman's) right, title, & interest in and to the Col. Sellers & Accident lodes and by subsequent deed from W. F. Patrick to me for $\frac{1}{16}$ interest in & to the Col. Sellers & Accident lodes. Nov. 6, '82. John Livezey, Jr."

(The endorsement on back in black ink is as follows:)

"Leadville, Col., May 11th, 1882. For value received I do hereby transfer all my right, title, and interest in and to the within contract to John Livezey, Jr. As witness my hand this day and date above written. W. H. Wilson. Witness, W. F. Patrick."

102 Q. You may state whether or not you notified the plaintiff of the fact that the shaft that you were sinking on the Col. Sellers claim under your contract known as Exhibit "A" was blown up by giant powder; and, if so, when and in what manner you so informed him.

A. Yes; I notified him of the fact by letter of May 21st, 1882. I mentioned the fact.

103 Q. Is the letter of May 21st, 1882, that you refer to the same letter that was introduced by the plaintiff in evidence in his redirect examination taken in this case and marked Plaintiff's Exhibit No. —?

A. Yes; that is the same letter.

104 Q. You may state who, if any one, paid the expenses and costs of making applications for patent for the Col. Sellers and Accident claims, the costs of the survey for the purpose of locating the shaft, and also for the purpose of making the patent survey, and the expenses of the suits that were commenced, the engine and other machinery that was placed on the claim from the 15th of March until about the 8th of May, 1882.

A. The cost of sinking the shaft the first hundred feet, cost of the first amount that I paid to the surveyor, was one hundred
477 dollars on account, and cost of the timbers for the first hundred feet was advanced by me and was afterwards paid by myself; paid one-half. Bowman paid three-eighths and John Livezey, Jr., paid one-eighth.

105 Q. From the 17th of February, 1882, the date of your contract, Exhibit "A," down to the 19th of June, 1882, I will ask you whether any money was paid or any work done or any expenses or costs provided for in the performance of said contract by the plaintiff.

A. No; there was not. There was nothing paid until the 19th of June by the plaintiff.

106 Q. In the contract to which your attention had been called and which is marked Defendants' Exhibit "B" it is provided "that William H. Wilson shall have a one-fourth of said Bowman's interest—that is, one-eighth of said contract, said Wilson paying his proportionate share of all expenses incurred under said contract, payment to be made within ten days after receiving from you, said Patrick, notice of the amount due, and failure so to do shall work a full forfeiture of said contract, time and payment as above being by agreement the essence of the contract." I will ask you whether you made demand on said Wilson for the proportionate share of the expenses of working said Col. Sellers claim under said contract, Exhibit "A," within the ten days provided for in said contract.

A. Yes; I made that demand upon either Wilson or his assignee, Livezey, I am not positive which.

107 Q. I will ask you when next after you commenced work on the Col. Sellers claim under your contract, Exhibit "A," you met the plaintiff Bowman and where.

A. The next I saw Bowman and met him was in Denver about the 3d or 4th of May, 1882. I went down to Denver and met Bow-

man, and we had some business down there in regard to the St. Louis claim, and he at that time came up to Leadville with me.

478 108 Q. He came up here with you?

A. Yes; and at that time I took him to my house and he stayed at the house with me for two or three days.

109 Q. That was the occasion of your taking him, the plaintiff, to your house?

A. It was. We were interested together in this Col. Sellers matter, and he was acting as my attorney. I thought it would be showing him a little more courtesy to take him to the house than take him to a hotel.

110 Q. Was it because you were unwilling to incur the expense of keeping him at the hotel?

A. No, sir.

111 Q. At the time that you have stated that you took him to your house instead of providing for him at the hotel, what was the plaintiff's condition?

A. Well, he was apparently in good health when he reached Leadville, but shortly afterwards he seemed to be effected by the altitude here, became sick, and was sick most of the time he was here, I suppose two or three days.

112 Q. Who took care of him at your house?

A. Mrs. Patrick and myself took care of him.

113 Q. Was that the time that the contract known as Exhibit "B" was drawn in your house?

A. Yes; that was the time.

114 Q. Did you at the time the plaintiff was in Leadville or Denver, about the 8th of May, 1882, have any conversation with him or any discussion as to the expenses that had been incurred up to that time in the performance of the contract known as Exhibit "A"?

A. Yes; we talked the matter over fully. I told him just what had been done about letting this contract; showed him the amounts that I had already paid on it, two or three different amounts; I showed him the amount of the lumber bill; also I paid C. F. Dunham, surveyor, one hundred dollars on account and told him about when the balance of this money would be due on this first contract for one hundred feet; it would be due in a few days, and

479 we agreed upon that matter. He showed me some items that he had charged against me on account of travelling expenses incurred in regard to the St. Louis.

115 Q. St. Louis mining claim?

A. St. Louis mining claim, and we agreed then about that time on the basis of settlement. I was to credit him with the amount that he had expended on my account for the St. Louis claim and he was to send me the balance of the money due me; and at the same time I told him that I didn't think that Wilson would pay his one-eighth of the amount and told him that I would ask him for it, but I didn't think he would pay it, and that within a few days I would draw upon him in St. Louis for one of two amounts, either balance one-half——

116 Q. Half of what?

A. Half the expenses of this shaft and survey up to date, allowing him credit for the amount that was due from me to Bowman; that I would draw for one-half less the eighth and also less the credit, and Bowman at that time made a memorandum of the two amounts and said he would instruct the Boatman's Bank of St. Louis to pay either amount.

117 Q. Made a memorandum where?

A. He had a little note book with him and put it on his note book.

118 Q. Now, you may state the amount of expenditures that had been incurred up to the time of Bowman's visit here about the 8th of May, 1882, in the performance of the contract introduced as Defendants' Exhibit "A."

A. The amount of the expenses which were at that time due, the balance due, were fourteen hundred and seventy-four dollars and fifty cents. The items of that was sinking one hundred feet, $10.00 per foot, $1,000.00; lumber bill, $374.50; $100.00 I had paid C. F. Dunham on account of this patent survey.

119 Q. Does that amount represent the entire expenses and liabilities that had been incurred by you and Bowman at that date under this contract?

480 A. Yes; that was all at that time; about May 6th or 8th.

120 Q. How much was due from you at that time to the plaintiff on account of his expenses incurred in business for you other than the business of the Col. Sellers and Accident claims?

A. Two hundred and sixty-three dollars and forty cents.

121 Q. How much of the sum of $1,474.50, that you say represents your expenditures at that date, was chargeable to your interest?

A. One-half of it.

122 Q. How much was chargeable to Bowman's interest under your partnership arrangement?

A. One-half the same amount—$737.25.

123 Q. How much would be chargeable to the interest of W. H. Wilson, provided he performed the contract that he made with the plaintiff, known as Exhibit "B," by paying his proportionate share?

A. One-eighth of that amount.

124 Q. You may state whether or not you discussed with the plaintiff, at the time that you met him in May, 1882, the amount that would be chargeable to the several interests, and whether the amount due from yourself, the plaintiff, and Wilson was determined between you and the plaintiff.

A. Yes; the amounts were settled; fixed upon.

124 Q. You say that the plaintiff directed you to draw on him for one of two amounts, and that he would instruct the Boatman's Bank of St. Louis to honor your draft for either amount. You may state what amounts you agreed upon as being the sums for which you should draw.

A. Yes; it was understood between us that I should draw for

either amount. The amount was either $465.00 or else $288.70. We got at this—do you want me to state how I got at this?

125 Q. State how those two amounts were arrived at between you and the plaintiff.

481 A. It does not exactly balance. I must have stated the amount due from Bowman a little wrong. I stated it $263.40. That is my recollection of it, but the amount due from Bowman under the original contract would have been one-half of $1,474.50, or $737.25. I deducted in the first place $263.40—if that was the correct amount—from $737.25, which would leave $473.85. I drew for $465.00. Now, from $473.85 deduct the amount due from Livezey at the time from Wilson, $183.70; that should be $184.30 instead of $183.70. That would be one-eighth of $1,474.50. It should be $184.30, one-eighth of $1,474.50, instead of $183.70. I have it about right. The amount due from Bowman under the original contract was one-half of $1,474.50, or $737.25; and amount which would be due from Wilson under contract of May 6th would be $184.30, one-eighth of the total expenditures up to that time. Deducting $184.70 from $737.25 leaves $552.25, which would be due from Bowman; and then I gave him credit for the amount that he claimed was due from me, as I remember, $263.40. It leaves $288.15. It is a mistake of fifty-five cents somewhere, because the true amount was $288.70.

126 Q. Bowman's claim was $264.23?

A. I can tell by my book.

127 Q. You say that you drew a draft?

A. The understanding was between Mr. Bowman and myself *was* that I was to draw for either $465.00 or $288.70.

128 Q. For which amount did you draw on the plaintiff?

A. I drew for $465.00.

129 Q. When did you make that draft on him?

A. On the 13th of May, 1882.

130 Q. Was that draft paid?

A. No, sir; it was not paid.

131 Q. What became of it?

A. It was returned to me protested.

132 Q. Have you that draft in your possession?

A. Yes, sir.

482 133 Q. Where is it?

A. Among the papers here.

134 Q. The draft or protest?

A. My recollection is they are both here.

135 Q. I now hand you a notice of protest dated St. Louis, Mo., May 18th, 1882, addressed to W. F. Patrick, Esq., and signed by Charles S. Taussig, notary public, with the seal of said Taussig, notary public, St. Louis, Mo., and ask you if you received said notice, when, and how.

A. I received that notice in Leadville by mail.

136 Q. Is that the certificate of protest of the draft for $465.00 which you have testified you drew on Bowman on the 13th of May, 1882?

A. Yes; that is the notice of protest.

Counsel for defendants offers in evidence the notice referred to in the last question and answer, and asks that the same be marked by the commissioner Defendants' Exhibit "C," which is in the words and figures following, to wit:

"Chas. S. Taussig, attorney-at-law, 509 Olive street, rooms 1 and 2.

"ST. LOUIS, Mo., *May* 16, 1882.

"To W. F. Patrick, Esq.

"SIR: Please to take notice, that a bill of exchange for $465.00 dated May 13, 1882, drawn by W. F. Patrick in favor of Bank of Leadville on Frank J. Bowman endorsed by Bank of Leadville payable at sight at —— having been protested by me this day for non-payment after having made legal demand for the same, I hereby at the request of Bank of Commerce, St. Louis, Mo., the holder thereof, notify you that it looks to you for payment, interest, damages and costs.

"Your obedient servant,

"CHARLES S. TAUSSIG,

[SEAL.] "*Notary Public, City of St. Louis., Mo.*

"My term expires June 29, 1885."

137 Q. Do you know where the draft to which Defendants' Exhibit "F" refers now is?

483 A. No; I do not. I thought it was among these papers here; that is my best impression in regard to that.

138 Q. Did you receive any communication from the plaintiff concerning said protested draft; and, if so, when and what communication did you receive?

A. Yes; I received a telegram from the plaintiff and also, I think, a letter in regard to that draft.

139 Q. I now hand you what purports to be a telegram dated St. Louis, Mo., —— 15, '82, received at Leadville, Colorado, 5.45 p. m., addressed to William F. Patrick, which reads as follows: "Must know Wilson's conclusion. Rebates not satisfactory. Answer at on-e. Frank J. Bowman," and ask you to examine the same and state whether you know anything about it.

A. (Examines paper.) Yes; that is the telegram I received in regard to that draft. I received that on the 15th of May, 1882, in Leadville.

140 Q. You may state, if you know, what is meant in said telegram by the words "must know Wilson's conclusion."

A. Well, he means that he must know whether Wilson had concluded to pay or not.

141 Q. Pay what?

A. Pay this one-eighth of the expenses incurred in sinking this shaft and making application for patent under this contract that Bowman had made with Wilson of May 6th.

142 Q. What is meant in said telegram by the words "rebates not satisfactory"?

A. He means that it was not satisfactory to him, Bowman, that I should draw for $465.00, and in case Wilson should pay—should afterwards pay—that I should rebate to Bowman the amount that Wilson paid me, or $184.30.

143 Q. What was the agreement between you and Bowman at the time of your conversation with him in May, 1882, when he authorized you to draw for either the sum of $465.00 or $288.70 concerning rebates?

484 A. Well, the conversation was that I told Bowman at the time that I didn't think Wilson would pay this amount and that I should draw; I would ask him for it, and if he didn't pay it promptly I would draw for the full amount due from Bowman, which was $465.00, and if he afterwards did pay I would rebate or credit him with $184.30, the amount due from Wilson.

144 Q. When would the ten days expire in which Wilson or his assignee, Livezey, could pay their proportionate share of the expenses of working the mining claims and obtaining patent therefor under the contract known as Defendants' Exhibit "B"?

A. I can't fix exactly the date upon which I made demand upon Wilson; under the contract it would expire within ten days after I made the demand.

145 Q. Was there any understanding between you and the plaintiff as to what should be done in the event that the plaintiff paid your draft of $465.00 and Wilson afterwards paid his proportionate share of the expenses?

A. Yes; if Wilson paid within ten days, the understanding was that this contract of May 6th should stand; if it was not paid within ten days, the contract should be declared null and void.

146 Q. What was the understanding as to what should be done with the difference between $465.00 and $288.70 in the event that Wilson should pay his eighth share of the expenses?

A. That was the amount, was $184.30, was to be credited to Wilson or to his assignee, whoever it was at that time, and he should continue in the contract, and I should make further demands upon him as the debts were incurred.

146 Q. But as to this amount that Bowman would in that case overpay?

A. He was to be rebated and sent back to Bowman.

147 Q. I will ask you whether the words "rebates not satisfactory" had any application to or connection with any other business matter or thing in which you and Bowman were jointly in-

485 terested, independent of the contract between you and him relating to the Col. Sellers and Accident mines.

A. No.

148 Q. Why could it not relate to other matter than the Col. Sellers and Accident business?

A. Well, there was no other matter between us in which there was any particular money matters, and I know it refers to that in the connection it is mentioned in letters of mine and also in letters I received from Bowman.

Counsel for defendants now offers in evidence the telegram concerning which the witness has testified, dated St. Louis, Mo., —— 15, '82, and asks that the commissioner mark the same Defendants' Exhibit "D," which is in the words and figures following, to wit:

"Dated St. Louis, Mo., —— 15, 1882.
Received at 5.45 p. m.

To Wm. F. Patrick:

Must know Wilson'- conclusion; rebates not satisfactory. Answer at once.

FRANK J. BOWMAN."

149 Q. After the receipt of the telegram marked Defendants' Exhibit "D" did you communicate with the plaintiff concerning the subject of your draft of $465.00 on him, of which you have testified, and also on the subject of said telegram; and, if so, how and when?

A. Yes; I wrote to Bowman on that same day, May 15th, 1882, and I think I also telegraphed to him the same day, trying to explain the matter by telegram.

150 Q. Have you the telegram and letter that you have just referred to in your possession or power to produce?

A. No; I have not.

151 Q. Have you copies of them?

A. No; except so far as that is a copy. It appears in evidence here.

152 Q. What copy do you refer to?

A. I mean the letter—a copy of the letter introduced by Bowman in testimony.

153 Q. Of what date?

A. The letter?

154 Q. Of May 21st?

A. Yes.

486 155 Q. I now call your attention to a paper offered in evidence by the plaintiff and marked Plaintiff's Exhibit No. 18, which purports to be a letter dated Leadville, May 21st, 1882, addressed to Frank J. Bowman, St. Louis, Mo., and purporting to have been written by you, and ask you if that is the letter you refer to as being in answer to his telegram, known as Defendants' Exhibit "D."

A. That is in answer to the telegram and also to the letter that I received from Bowman.

156 Q. I now hand you a letter dated St. Louis, May 15th, addressed Mr. William F. Patrick, and signed by Frank J. Bowman, and ask you in whose handwriting is said letter and signature.

A. Yes; this is the same letter that I received.

157 Q. In whose handwriting and signature?

A. That is in the handwriting of Frank J. Bowman and signed by Frank J. Bowman.

Counsel for defendants now offers in evidence the letter referred

to by the witness in his last answer and asks that the same be marked Defendants' Exhibit "E," which is in the words and figures following, to wit:

"Frank J. Bowman, attorney-at-law, N. W. corner 8th and Pine Sts.

"ST. LOUIS, *May 15th*, 1882.

"Mr. Wm. F. Patrick.

"MY DEAR SIR: Yours of 10th received enclosing report from Harrison reduction works. Silver per ton ore 2,000 lbs. 0. Gold 0 copper — lead 0. What does it mean? I confess I am a little confused; and the most confusing part of all is the letter that encloses a bill from McKinzie for $500.00; is he a lunatic or does he think me one? You paid him $20.00 for his work. I paid one-half in our settlement. I told him to help us investigate the matter, if it would pay. I would form a St. Louis Co. to work it & put him in charge. What would he think if I enclosed him a bill for my time & service. I think it as valuable as his own & as much
487 chargeable to him as his to me. Wilson made a claim (all Leadville seems to be a 'claim') for an interest in the 'Col. Sellers' & 'Accident.' I yielded to his request; it was my duty to do so, & stated that he could name the interest he wished to represent he named the interest & promised his share of the money; you were to collect of him, or forfeit his claim for non-payment. Your brother's interest I agreed to carry & am willing to, but now you draw on me without collecting of Wilson or securing his relinquishment; this much I expected you to do. I have telegraphed you, but can get no answer. I leave in an hour for Chicago. Most business affairs I can understand. Leadville is to me a little incomprehensible. I want an explanation.

Yours truly."

(On margin is the following:) "Has the injunction suit been filed? Do not contract for further expense until it has been. Telegraph me.

"FRANK J. BOWMAN."

158 Q. You may state who paid the expenses and costs that were incurred in the performance of the contract known as Exhibit "A" from the 17th of February, 1882, down to June 19th, 1882, and refer to expenses that were chargeable against yourself and the plaintiff under said contract.

A. I paid all those expenses as they became due, and I afterwards collected a portion of those from Bowman, as I have stated, and also a portion from John Livezey, Jr.

159 Q. I mean down to this time. Who paid them to the 19th of June, 1882?

A. I paid them all up to that date, as I have stated.

160 Q. Did you receive any letters or telegrams or have any sort of communication from the plaintiff from the time that you received the telegram, Exhibit "D," and the letter, Exhibit "E," to the 19th of June, 1882?

488 A. I do not remember any between these two dates.

161 Q. Did you receive any answer from the plaintiff or any communication from him in answer to your letter of May 21st, 1882?

A. I think not.

162 Q. I will now ask you what expenses accrued and what liabilities were incurred by you and Bowman under the contract, Defendants' Exhibit "A," between the 8th of May, 1882, and the 19th of June, 1882.

A. Between those two dates I bought a hoisting engine to put on the Col. Sellers, and boiler, and in the meantime after the first contract for the one hundred feet had been finished I let a second contract to the same parties for one hundred feet more at the rate of $19.00 per foot, and they done some work upon that and had received some money upon that second contract, and there was also some money expended in trying to trace up who had blown up this shaft about the 15th of May, and there was some more money paid on account of the survey. In order to fix those amounts definitely I would have to refer to my memorandum there.

163 Q. State what expenses, if any, accrued in the performance of the contract, Exhibit "A," from the time of the commencement of the work down to the 8th of May, 1882, other than this included in the statement that you have already made, aggregating $1,474.50.

A. Down to the 8th of May the total amount was $1,474.50.

164 Q. Was not there any other besides that?

A. Not up to that date.

165 Q. That represented the entire indebtedness, did it?

A. Up to that time; yes.

166 Q. Then state, if you can, the items of expense and liabilities that were incurred from the 28th of May to the 19th of June, 1882.

A. I will have to refer to that memorandum in order to
489 give them definitely.

167 Q. Get it; give us the items.

A. On the 8th of May we had settled for the first contract, one hundred feet, and also the lumber that was used in that contract, and the $100.00 that I paid the surveyor. The next item was May 22nd. I paid to J. Byrne, detective, $25.00.

168 Q. What was that paid for?

A. I employed this man to see if he could find out definitely who blew up that shaft on or about the 15th of May.

169 Q. What is the next item?

A. The next item is May 24th, hoisting engine, $100.00.

170 Q. Does that include the whole amount?

A. No; that was on account; May 25th, hoisting engine, $85.75; May 27th, same account, $200.00; May 29th, same account, $20.00. These items were divided up that way, because we bought the hoister engine from a man in Kokomo, who—when he came to deliver it there were some judgments on it, and it was divided up that way.

(By Mr. McGINNIS:)

171 Q. What was the name of the man in Kokomo?

A. I do not recollect his name now; he was around here for a long time; I think I can give you that name, though. (Witness looks in book.) At Robinson it was, rather, not Kokomo; they are towns very close together up there. His name was J. V. Skidmore.

(Mr. PARSONS continues:)

172 Q. What is the next item?

A. May 30th, express wagon to mine, $9.00.

173 Q. What was that for?

A. That was taking up some little fittings for the engine; June 4th, Leadville Transfer Company—that was for delivering the engine from the depot to the mine—$55.00; June 9th, tank for the water for the boiler, $10.00; June 9th, Dennis and Coble—they got a gallows frame—carpenters, $75.00, and on June 19th, Riling and
490 Warner, blacksmith work, $24.00.

174 Q. How much does that aggregate?

A. Between those two dates $603.75. Between those two dates I paid, I think, the contractors on the first—that is, between May 8th and May 22nd I paid the contractors the balance due on the first contract, the first amount due them. I haven't put that down because it was included in the first settlement of May.

175 Q. Now, you may state the aggregate expenditures and liabilities incurred under your contract, Exhibit "A," on the 19th of June, 1882.

A. That would be $1,474.50 and $603.75.

176 Q. Add them together.

A. $2,078.25.

177 Q. How much of said indebtedness had been paid on the 19th of June, 1882, and by whom was the same paid?

A. I paid all of that.

178 Q. State whether or not on the 19th of June, 1882, you met the plaintiff; and, if so, where.

A. Yes; I met the plaintiff in St. Louis at his office on the 19th of June, 1882, and several days before that at different times.

179 Q. Did you have any settlement with him—with the plaintiff—on the 19th of June, 1882?

A. Yes, sir.

180 Q. State what things were included in said settlement.

A. Well, there were only three items included in that settlement of the 19th of June; that was the first contract that I had given to a gentleman for sinking one hundred feet at $10.00 per foot, which made $1,000.00; the lumber bill of Havens and Beman of $374.50; and the $100.00 that I had paid C. F. Dunham on account of patent survey.

181 Q. What was the aggregate amount of those items?

A. $1,474.50.

182 Q. State why the total expenditures at that date was not set-

tled between you and the plaintiff in your settlement of the
491 19th of June, 1882.

A. Mr. Bowman at that time stated to me that he was short of funds, was hard up, and he could not; he asked me as an accommodation favor to him to wait on him for awhile in order to settle up the amount due on the first contract, which was the same amount we had talked over about the 8th of May in Leadville.

183 Q. What did you say?

A. I told him that I was needing money myself, but I would wait awhile for him, and so we settled on that amount.

184 Q. How was that settlement made?

A. The settlement was made by ascertaining what was due on his amount—that is, three-eighths.

185 Q. Which would be how much?

A. Which would be $552.00 and some cents, three-eighths of $1,474.50, and he deducted from that the amount that he claimed was due from me to him on account of money he had expended in the St. Louis matter, and also the amount that was one-eighth of the total expenses I was to collect from John Livezey, Jr., the assignee of Wilson, on the contract of May 6th, 1882; that left a balance of $288.70 as due from Bowman to myself; before that he gave me his note for ninety days at eight per cent. interest.

186 Q. Was anything said at that time by the plaintiff why he gave you his note, as you have described, instead of paying the money?

A. Yes, sir; he said that he was short of funds and did not have the money to pay with, and that I could probably use the note, have it discounted and use it, realize the money on it.

187 Q. Was anything said by the plaintiff at that time as to the payment of the note when it became due?

A. Yes; he said he would pay it when it became due.

188 Q. You may state what, if anything, was said or done
492 by the plaintiff in the settlement of June 19th, 1882, by which you arrived at the figures you have given, namely, $552.93, as due from him, and the other amounts that you have stated as due from the parties respectively.

A. It was before this I had written to Mr. Bowman that on May 24th I had made demand on Wilson for his money and that he hadn't paid and he was out, and we discussed that matter at this time, and between May 21st and June 19th, when I saw Bowman, Mr. Livezey had expressed his desire to pay and remain in this contract from Bowman, and I discussed that matter, and he (Bowman) said that he was willing that he should remain in and that I should accept this money from him on my return to Leadville, so that amount was deducted from Bowman's half, and Bowman paid me three-eighths of the expenses, as I have stated—that is, gave me his note for a portion and I gave him credit for another portion.

189 Q. What did you give the plaintiff credit for in that settlement and on what account?

A. I gave him credit for the difference between $288.70 and $552.93 on account of the money that he had expended in the St.

Louis litigation—travelling expenses that he had incurred in the St. Louis matter.

190 Q. You may state whether or not in the settlement of June 19th, 1882, you exhibited to the plaintiff the several items of account which aggregated the sum of $1,474.50.

A. Yes, sir.

191 Q. What did he do in regard to arriving at the several amounts that you have stated?

A. He went over the figures himself to see if they were correct.

192 Q. State whether or not you informed the plaintiff at that settlement that John Livezey, Jr., had offered to pay his proportion of the expenses that was chargeable against the interest assigned by Bowman to Wilson and by Wilson to him, Livezey?

A. Yes; I did.

493 193 Q. You say that you refused to receive from Livezey the amount that was due on said interest at the time that he offered to pay the same. You may state why you so refused.

A. Because I had written to Bowman on the 21st of May that Wilson had not paid and was out of the contract, and I didn't know whether Bowman wanted to insist on that forfeiture or not.

194 Q. What did the plaintiff say when you told him of this offer of Livezey's?

A. He said he was willing that I should accept that money and allow him to remain in the contract, or words to that effect.

195 Q. You may state whether or not at that settlement of June 19th, 1882, you simply presented to the plaintiff the aggregate amount of the indebtedness that was included in that settlement and that he simply paid to you the amount that you demanded of him without inquiring into the details of the settlement at all.

A. No; I presented it to him at that time and we had gone into that whole matter when he was in Leadville in May previous.

196 Q. Did you inform the plaintiff at that time of the other expenditures that had been made in the performance of the contract, Defendants' Exhibit "A," and which were not included in the amounts, aggregating $1,474.50, which were settled for in that settlement?

A. I gave him—I do not know that I gave him the items specifically; I gave him—I told him that I had bought this engine at a cost of about $400.00 and let a new contract at $19.00 a foot, and that the contractors were at work on it. I know I gave him these separate items.

197 Q. Was any settlement made at that time between you and the plaintiff of any expenditures or liabilities incurred under the contract Exhibit "A" except the three items aggregating $1,474.50, of which you have testified?

494 A. No; that was all that was included in that settlement.

198 Q. State whether or not at the time of the settlement of June 19th, 1882, the plaintiff informed you that he was about to start off on a hunting and fishing trip, and that he would not return until some time in September following, and that during his absence he would transact no business of any kind or would trans-

act no business concerning your partnership interests under the contract known as Defendants' Exhibit "A."

A. He told me at the time that he was going to leave within a few days for Bayfield, Wisconsin, or near Bayfield, Wisconsin, and gave me that as his post-office address, but he did not say that he would not transact any business during the summer.

199 Q. Was there any understanding or agreement of any kind between you and the plaintiff that you should not make any demands on him for money, and that he should have nothing to do with the business growing out of your partnership arrangements in the development of the Col. Sellers and Accident claims under said contract during his absence on his fishing and hunting expedition?

A. No; there was no such agreement as that.

200 Q. Have you any reason for stating that you did not many any such agreement?

A. Well, the only reason I have is that he gave me his post-office address so that I could communicate with him. He told me that his post-office address during the summer would be Bayfield, Wisconsin.

201 Q. State whether you were so situated financially at that time that you could carry on the work and provide for the expenses under the contract known as Defendants' Exhibit "A" from June to September without calling upon the plaintiff to bear his proportion of the burden of that contract?

A. No; I was not. At the time I was in St. Louis, on the 19th of June, 1882, I borrowed money. I borrowed $4,000.00 to use in sinking this shaft—most of it.

495 202 Q. Did you know that it was the plaintiff's custom and habit of going off on a fishing expedition—fishing and hunting expedition—every year, about June or July every year, and remaining away until September, and that during the time of his remaining away he would transact no business of any nature whatever?

A. No; I did not, except he told me it had been his custom to go to this place in Wisconsin.

203 Q. At the time of the settlement of June 19th, 1882, I will ask you if the plaintiff informed you that he would transact no business relating to the development of the Col. Sellers and Accident mines under your contract during his absence and would pay none of the expenditures incident to the performance of said contract during said time.

A. No; he did not.

204 Q. Was anything said by you or by the plaintiff at the time of the settlement of June 19th, 1882, concerning the future work on the Col. Sellers and Accident claims under your contract of the 17th of February, 1882?

A. Yes; there was some talk in regard to it. I had been in St. Louis several days and Bowman told me when I first went to St. Louis—about the time I first reached there—that he wanted me to meet several gentlemen and they would enter into an arrangement to pay all this expense that had been incurred and would be in-

curred in sinking this shaft and would give us a non-assessible interest. I made several appointments with him to meet those gentlemen and they failed to come around as they said they would, and so on the 19th of June we had this settlement, and at that time he told me that in his view he thought I only ought to do a little work ever- ten days as specified in the contract—that is, there is a clause in the contract which relates to that, if the work is suspended ten days we should forfeit the contract—and he said that in his opinion a little work every ten days would be a complete fulfill-
496 ment of that contract and would keep that alive, and I told him at the time that I didn't think it was in the spirit and letter of the contract, but that I would consult with an attorney in Leadville, Col. Bissell, in regard to it, who would advise me in regard to it, and that was about all that was said, and I told him what had been done and what I expected to do under the arrangement.

205 Q. What, if anything, was said by the plaintiff in that conversation or at the time of the settlement of June 19th, 1882, about disposing of his interest in the contract?

A. He made me a proposition at that time, as I remember, after I secured this note; if I would surrender the note he would surrender all his right, title, and interest under that contract to me, and I told him at the time that I had about all I could carry, and I didn't think I could afford to take it, but thought I knew a man out West who I thought would take it, and that on my return I would speak to him in regard to it, and, as I remember, I left St. Louis the same evening.

206 Q. What same evening?

A. June 19th, 1882, and came back to Leadville.

207 Q. You may state when you returned to Leadville after your settlement of the 19th of June, 1882.

A. I reached Leadville about the 23d or 24th of June, 1882.

208 Q. State whether or not you made any effort to dispose of the interest of Bowman in pursuance of the proposition which you say he made to you at the time that you obtained his note for $288.70.

A. Yes; I spoke to a gentleman in regard to it.

(Mr. McGINNIS:)

209 Q. Give his name.

A. I spoke to Col. Bissell in regard to it.

(Mr. PARSONS continues:)

210 Q. With what result?

A. He refused to take it on account of the litigation that was on the property at the time; these jumpers and other suits.

497 211 Q. I will ask you whether you consulted your attorney when you returned from St. Louis in regard to Bowman's suggestion that you do a little work every ten days so as to save your contract from forfeiture; and, if so, did you advise the plaintiff of the opinion given to you by the attorney?

A. Yes; I consulted with Col. Bissell, who was at that time acting as my attorney, and he advised me to do a little work every ten

days, as suggested by Bowman, would not be a fulfillment of our contract of February 17th, 1882, and to undertake anything of that kind would probably cause a forfeiture of the whole thing and we would lose what we had already expended in the matter. I advised Bowman of this in a letter.

212 Q. What date?

A. July 5th, 1882.

213 Q. I will call your attention to the letter of the plaintiff marked Defendants' Exhibit "E," in which are the words following: "Has the injunction suit been filed? Don't contract for further expenses until it has been. Telegraph me," and ask you if you wrote to him concerning the subject of that inquiry.

A. Yes; I wrote to him in regard to that on the 21st of May, 1882, the same letter in which I explained to him the matter in regard to rebates on the Wilson interest.

214 Q. The same letter that has been introduced in evidence by the plaintiff marked Exhibit No. 18?

A. I do not remember the number.

215 Q. Do you know why an injunction suit had not been filed at that time or subsequently?

A. Yes; when Bowman was here in May, 1882, about the 6th or 8th, I think, he advised me to make an application for an injunction against these jumpers and restrain them from working any longer, and said that in his opinion the injunction would lie; I
498 consulted with Col. Bissell, and also with C. C. Parsons, in regard to it, and they said it would be useless to apply for an injunction; that we had no mineral in rock in place on the Sellers and had no valid location, and therefore the judge would not grant an injunction. I told Bowman this in that letter, and also told him I had been trying to ascertain who blew up the shaft, with the hope of proving that it was instigated and done by one of the jumpers, and if — could do that these same persons, Bissell and Parsons, were of the opinion that I could get the injunction, and so far I had been unsuccessful in ascertaining who it was.

216 Q. Have you the original letter, which you say you wrote to the plaintiff, dated the 5th of July, 1882?

A. No; I have not.

At this point counsel for defendant calls upon counsel for the plaintiff for the production of the letter of July 5th, 1882, in pursuance of notice this day served upon him, and also calls for the production of the letter or letters mentioned in said notice in which it is claimed by the plaintiff that the defendant William F. Patrick — it would be necessary to expend $9,000.00 in elaborate preparations to determine whether or not there was any mineral in the Col. Sellers and Accident claims or either of them, and also for the production of the note dated June 19th, 1882, for the sum of $288.70, executed and delivered by the plaintiff, Frank J. Bowman, to the defendant William F. Patrick, due ninety days after date, service of which notice was accepted by E. McGinness, Esq., counsel for the plaintiff, and also for the production of the letters, telegrams, and

writings mentioned and described in a certain other notice which was served upon counsel for the plaintiff on the 20th day of October, 1887, and service of which is acknowledged by him.

499 (Mr. McGINNIS:) I have no answer. You must draw your own conclusions as to whether we have any of these letters or not.

(Mr. PARSONS:) Counsel for the defendants ask the counsel for the plaintiff whether or not he will produce the letters, papers, and writings asked for in the two notices just mentioned.

(Mr. McGINNIS:) Counsel for plaintiff replies that he does not believe that any such letter of July 5th, 1882, was ever written by the defendant William F. Patrick to Frank J. Bowman; he never saw that note nor those telegrams you speak of.

(Mr. PARSONS:) Or any other letters mentioned in these two notices?

(Mr. McGINNIS:) I do not know what letters you mean. Everything coming into my possession came to me as attorney through my professional service from my client, and I decline to state what I have and to produce them except when I see fit; but before we are through, every letter we have will be produced in the cross-examination of witnesses, but I decline to let you see them at this time so they may know how to testify.

217 Q. I now hand you a paper purporting to be a letter dated Leadville, July 5th, 1882, addressed to Mr. Frank J. Bowman, Merchants' hotel, St. Paul, Minn., and signed by W. F. Patrick, and ask you to state what you know about said paper.

A. That is a copy of the letter that I wrote to Frank J. Bowman on the 5th of July, 1882, addressed the letter to Frank J. Bowman, Merchants' hotel, St. Paul, Minnesota, and mailed it to him at that place.

Counsel for defendants now offers copy of the letter dated Leadville, July 5th, 1882, addressed to Frank J. Bowman, Merchants' hotel, St. Paul, Minnesota, and asks that the commissioner mark the same Defendants' Exhibit "F," which is in the words and figures following, to wit:

500 "LEADVILLE, *July* 5, 1882.

"Mr. Frank J. Bowman, Merchants' hotel, St. Paul, Minn.

"DEAR SIR: I send you a statement of all amounts paid on the Col. Sellers contract since our settlement from which you will see that the am't due from you thereon is $952.32 for which am't I will draw on you to-morrow. I wish to notify you and hereby do so, that if the draft is not paid that I will apply to Stebbins and Robinson and their partners for a new contract in my own name. I have consulted an attorney here and am satisfied that we are obliged to continue the work in order to comply with our contract and that your plan of doing a little work every ten days would not be acting according to its letter or spirit and would cause a forfeiture of the contract and loss of the am't we have spent in sinking the first 100

feet. The same attorney also tells me that under our contract if you do not pay your proportion when called upon you forfeit your rights under said contract. I want to deal fairly with you and will tell you that in my opinion the shaft which is now 165 feet deep is looking very promising and I think we are not very far from the contract. My reasons for thinking so are that the porphyry is now heavily iron-stained. Hope you will pay the draft and that we may continue the work together but if you do not I will have to protect myself and will do so by taking a new contract as I have said.

"I withdraw my offer to return your note of $288.70 dated June 19th 1882 in case you assign your interest in the contract to me.

"Yours truly W. F. PATRICK."

218 Q. Now, I will call your attention to a statement in the letter marked Defendants' Exhibit "F," as follows: "I send you a statement of all amounts paid on the Col. Sellers contract since our settlement, from which you will see that the amount due from
501 you is $952.32, for which I will draw on you to-morrow," and ask you whether or not you sent said letter and statement as mentioned therein.

A. Yes; I did.

219 Q. Have you a copy of said letter?

A. Yes.

220 Q. Do you know where the original is?

A. The original I mailed to Bowman.

221 Q. I now hand you a paper containing itemized account, and ask you to state in whose handwriting it is and what the paper is.

A. It is in my handwriting. It is a statement of the account in full from May 22d up to July 1st, inclusive—that is, the amount showing the amount of money that I expended on the Col. Sellers shaft between those two dates.

222 Q. State whether or not on your return from St. Louis you had any settlement with John Livezey, Jr., the assignee of William H. Wilson, of the interest obtained by Wilson from Bowman of May 6th, marked Defendants' Exhibit "B."

A. Yes; I settled with Livezey. He paid me $184.30, one-eighth of the amount.

223 Q. You may state whether or not the letter which you say you wrote to the plaintiff on the 5th of July, 1882, and which you say was directed to him at the Merchants' hotel, St. Paul, Minnesota, was ever returned to you.

A. No, sir.

224 Q. State whether or not the statement enclosed in said letter and of which you have testified was ever returned to you.

A. No; it was not.

225 Q. State whether or not you have ever seen either of them from the time that you mailed them to the present time.

A. No.

226 Q. State whether or not you ever received any answer to the

letter of July 5th, 1882, a copy of which has been introduced in evidance, marked Defendants' Exhibit "F."

A. No; I did not.

Counsel for defendants now offers in evidence the copy of the statement of account mentioned by the witness as having
502 been enclosed in the letter of July 5th, 1882, from the defendant William F. Patrick to the plaintiff and addressed to him care of Merchants' hotel, St. Paul, Minn., and ask the commissioner to mark the said Defendants' Exhibit "G," which is in the words and figures following, to wit:

May	22.	J. A. Byrne	25 00
	24.	Engine	100
	25.	"	85 75
	27.	"	200
	29.	" Carlin	20
	30.	Express wagon	9
June	4.	Leadville Transfer Co.	55
	9.	J. Carlin, tank	10
	9.	Dennis & Coble, gallows frame	75 00
	19.	Riling & Warren, blacksmiths	24 00
	27.	Engine balance	12 50
	28.	Havens & Beman	400
	"	Frank Gay, repairs	13
	28.	Extra work blowing up shaft	394 85
	"	Water for engine	45 50
	"	50 feet of 2nd contract, $19. 15 per cent.	807 50
	30.	Boetcher	77 20
	"	Havens & Beman	49 25
July	1.	Ed. Matthews, guard	35
	1.	Survey	100
		Assay	1

8)2,606.35

325.79
3
977.37

144
66.80
77.20

2,606.35
66.80
2,539.55

8)2,612.35*
2,539.55*
Livezey 326.54*
3*

979.62*
394.85
807.50
45.50
Bowman 1,247.85
66.80
1,181.05

15
34
76
56
19
253955

*Erased in original.

227 Q. State whether or not you drew a draft on the plaintiff for the sum of $952.32 on the 5th or about the 5th of July, 1882, as you stated you would in said letter.

A. Yes; I drew a draft the next day, on the 6th of July, 1882, on Frank J. Bowman, Merchants' hotel, St. Paul.

228 Q. For what amount?

A. For $952.32, which was three-eighth- of the total amount which the statement shows to be due at the time; that is due on the 1st of July.

503 229 Q. Did you deposit that draft for collection in any bank? If so, what bank?

A. Yes; I deposited that draft in the Bank of Leadville, Colorado, with instructions for them to send it on for collection, St. Paul.

230 Q. Was that draft paid by the plaintiff or by any one?

A. No; that draft was returned to me unpaid.

231 Q. About when did you receive the draft?

A. Well, as soon as it could go to St. Paul and back by mail.

232 Q. I now hand you a paper partly in writing and partly in print, which purports to be a draft, dated Leadville, Colorado, July 6th, 1882, and which reads as follows:

"$952.32. LEADVILLE, COL., *July* 6, 1882.

"At sight pay to the order of the Bank of Leadville nine hundred and fifty-two $\frac{52}{100}$ dollars, value received, and charge to the account of— with exchange

"W. F. PATRICK.

"Frank J. Bowman, No. —, St. Paul, Minn., Merchants' hotel."

addressed to Frank J. Bowman, St. Paul, Minn., Merchants' hotel, with the words in print "with exchange," and on the margin "the Bank of Leadville, Colorado;" endorsed on the back of it, "Pay E. H. Barley, Esq., or order, for collection account of Bank of Leadville; protest waived. Report by No. 6, George R. Fisher, cashier," and ask you whether or not that is the draft which you drew upon him and which you have referred to in your answer to the last question.

A. Yes; that is the draft; the writing on that draft is in my hand; it is signed by me.

Counsel for defendants now offers the draft referred to in the last question and answer in evidence and asks the commissioner to mark the same Defendants' Exhibit "H."

233 Q. Do you know what is the aggregate amount of the expenses accrued and liabilities incurred on the 1st of July, 1882, by you and the plaintiff in the working and development of the

504 Col. Sellers and Accident mines and in the performance of the contract introduced as Defendants' Exhibit "A"?

A. The aggregate amount not included in the settlement of June 19th up to and inclusive of July 1st was $2,539.55.

234 Q. You may state what proportion of that amount would be chargeable against the interest of the plaintiff at that time.

A. Three-eighths.

235 Q. State the amount.

A. $952.32.

236 Q. The same amount for which the draft of July 6th was drawn?

A. Yes.

237 Q. What amount was chargeable against the interest of John Livezey, Jr., the assignee of W. H. Wilson, under the contract known as Exhibit "B"?

A. The amount would be one-eighth of the aggregate amount, or $317.44.

238 Q. State whether or not the said John Livezey, Jr., paid the amount that you have stated as chargeable against his interest in said contract.

A. Yes; it was paid.

239 Q. State whether or not the plaintiff ever paid at any time the said amount of $952.32 which you say was chargeable against his interest on the 1st of July, 1882.

A. No; he never has.

240 Q. From that day to this?

A. No, sir.

241 Q. Who paid the indebtedness and the expenses incurred under the contract, Exhibit "A," from the 17th of February, 1882, to the 1st of July, 1882, exclusive of the amounts included in the settlement of June 19th, 1882?

A. John Livezey, Jr., and myself.

242 Q. In what proportion?

A. I paid seven-eighths of this expense; Livezey paid one-eighth.

243 Q. You may state whether you were embarrassed in providing the funds for the payment of these expenses, and whether
505 or not you were compelled to borrow money to meet said expenditures up to the 1st of July, 1882.

A. Yes; I borrowed while I was in St. Louis, on June 19th, 1882. I borrowed $4,000.00 there. I put up some fifty shares of Lindell street-railway stock that I had as collateral. I used quite a proportion of that to pay this expense incurred in sinking the shaft on the Col. Sellers claim; also sold some Government bonds that I had at that time and used the proceeds of that—a considerable part of it—and later on, in the fall of 1882, I borrowed on the same collateral, Lindell railway stock, $2,000.00 more. That I used, and I at various times borrowed small amounts from the Bank of Leadville.

244 Q. State whether or not you devoted any time—and, if so, how much—to the development of the Col. Sellers and Accident mining claims under your contract of the 17th of February, 1882, from the time the work was commenced down to the 1st of July, 1882, and during the time that the plaintiff was on his hunting and fishing expedition in northern Wisconsin.

A. Yes; I was in Leadville all that time, except a few days that I was in St. Louis, and devoted most of my time in looking after this

shaft. I went up there two or three time a week and sometimes most every day to see how they were getting along.

245 Q. You may state when next, after you drew the draft dated the 6th of July, 1882, for $952.32, and of which you have testified, you had any communication from the plaintiff on regard to your joint interests here in the Col. Sellers and Accident mining claims.

A. The next communication I had from Bowman was a telegram.

246 Q. You may state when you received the telegram referred to in your last answer—where the same was from.

A. I received a telegram about the 14th of July. The telegram was from Ashland, Wisconsin.

506 247 Q. I now hand you what purports to be a telegram dated Ashland, Wisconsin, dated —— 13, '82, received at —— 9.08 a. m., addressed to Wm. Patrick, which reads as follows: "Yours June twenty-second received yesterday proposition accepted send note Frank J. Bowman," and ask you whether that is the telegram referred to in your last answer.

A. Yes; that is the one.

248 Q. That appears to be a half-rate message or night message, and was dated on the 13th of July, 1882. You may state when you received that telegram.

A. I received it on the morning of the 14th of July, 1882.

Defendants' counsel now offers in evidence the telegram referred to in the last question and answer and asks that the same be marked Defendants' Exhibit "I."

249 Q. State what is meant by the words contained in said telegram marked Defendants' Exhibit "I" *by the words*, "Yours twenty-second received yesterday proposition accepted send note."

A. He means that he had received the letter I wrote him of the 22d of June from Denver, Colorado, and which he has introduced, in which I made—I told him that I knew a man who would pay the note that he had given me for $288.70 and would take his interest in this contract of the 17th of February, 1882.

250 Q. Is the letter of June 22d, 1882, referred to in the telegram marked Defendants' Exhibit "I," the same letter introduced by the plaintiff in his direct examination in this case and marked Plaintiff's Exhibit No. 19?

A. Yes; that is the letter; that is the same letter.

251 Q. You say in the letter of June 22d, 1882, marked Plaintiff's Exhibit No. 19, that you think you know a man who will pay the note which the plaintiff gave you and take his interest, all his interest, and let you go right ahead with the work. I
507 will ask you whether at that time you had endeavored to find some one to take the plaintiff's interest and pay his note.

A. No; I think it was later than that; I made this proposition to him on my return to Leadville that I have testified about.

252 Q. That was written before you reached Leadville?

A. Yes; that was written at Denver on my return from St. Louis.

253 Q. And before you got to Leadville?

A. Yes.

254 Q. You say in the same letter, "If you are willing to let it go on those terms, which is the same proposition you made me at your office, please telegraph me and I will try to make the arrangement;" what do you mean by the same proposition, which is the same proposition he made you at your office?

A. That is the proposition that I have already testified to, in which Bowman offered in his office, in St. Louis, on or about the 19th of June, that if I would surrender that note that he had given me that he would surrender all his right, title, and interest in the contract of February 17th, 1882.

At the hour of 5.40 p. m. the taking of testimony was continued until the hour of nine o'clock a. m. November 22d, A. D. 1887.

At the hour of nine o'clock a. m. June 22nd, 1887, the taking of testimony was resumed.

Direct examination of WILLIAM F. PATRICK resumed.

By C. C. PARSONS, Esq.:

255 Q. State whether or not you answered the telegram which you received from the plaintiff, dated Ashland, Wisconsin, —— 13, '82, and which has been introduced in evidence, marked Defendants' Exhibit "I."

A. Yes; I answered that telegram.

256 Q. How did you answer it?

A. I answered it on the next day after I received it, as I
508 remember, by telegram to Ashland, Wisconsin, and also to St. Louis, Missouri.

257 Q. Were the telegrams that you sent in answer to Exhibit "1" the ones introduced in evidence by the plaintiff and marked Plaintiff's Exhibits Nos. 20 and 21?

A. Yes: they were introduced by the plaintiff.

258 Q. Said telegrams are as follows: "To Frank J. Bowman, Eighth and Pine streets, St. Louis. Acceptance too late; proposition was dependent on immediate acceptance in St. Louis. See my letter of fifth W. F. Patrick" And a duplicate of the same telegram, dated Leadville, Colorado, —— 15, 1882, received at Ashland, June 16, to F. J. Bowman: "Acceptance too late proposition was dependent on immediate acceptance at St. Louis See my letter fifth F. W. Patrick." Were those letters the answer referred to and as being in answer to his telegram, to Exhibit "I"?

A. Yes.

259 Q. State what induced you to send those telegrams after your letter of June 22nd, 1882.

A. When I wrote the letter of June 22d I had in mind a gentleman who I thought would take this interest, and I wrote that letter from Denver; when the gentleman came to Leadville I spoke to him in regard to it.

260 Q. State who it was.

A. It was Col. J. B. Bissell, and when I came up to Leadville I spoke to him in regard to it, and he declined to take it and declined to take the interest and pay that note, and, as I told Bowman, I was carrying all I could; so between the 22d of June and that time I changed my mind—that is, between the 22d of June and July 5th in regard to it. I could not get Bissell to take the interest on the terms that I proposed to him.

261 Q. Did you at that time consult with your attorney, Mr. Bissell?

A. Yes; I consulted with him in regard to the matter, and told him that I wanted to get somebody to take that interest, Bow-
509 man wanted to get out, and he said it was no use of paying that note or having anybody else buy it; when another assessment was due to draw on Bowman, and if he does not pay your draft promptly just apply to the owners of the Col. Sellers—that is, to Stebbins, Robison, and others—for a new contract in your own name, leaving Bowman out, and when I wrote the letter of July 5th it was my intention to do that, and when I received Bowman's telegram of the 15th of July I so notified him in that telegram, in the two telegrams to Ashland, Wisconsin, and St. Louis, Missouri, of July 15th or 16th—which is it?

262 Q. The 15th?

A. July 15th.

263 Q. Were the two telegrams that you have referred to sent by you from Leadville on the 15th of July, 1882?

A. They must have been. I kept a copy of the telegrams at the time—that is, a pencil copy.

264 Q. What, if any, answer did you receive from the plaintiff in answer to the two telegrams referred to?

A. I received, as I remember, no answer at all.

265 Q. What was the next communication that you received from the plaintiff?

A. I received a letter from the plaintiff dated July 16th, 1882.

266 Q. I now hand you a letter purporting to be written by the plaintiff, Frank J. Bowman, and addressed to you, dated St. Paul, Minnesota, July 16th, 1882, and ask you to examine it and state in whose handwriting it is, and by whom was it signed?

A. That letter is in the handwriting of Frank J. Bowman, and was signed by Frank J. Bowman; it is his signature.

267 Q. Are you acquainted with the handwriting of Bowman so as to testify to it?

A. Yes, sir. I have a good many letters from him.

268 Q. You may state when, if at all, you received that letter.

A. I received that letter in Leadville in due course of
510 mail; I suppose about the 20th or 21st of July.

Counsel for the defendants now offers in evidence the letter referred to by the witness, dated St. Paul, Minn., July 16th, 1882, addressed to Wm. F. Patrick and signed by the plaintiff, Frank J. Bowman, and asks the commissioner to mark the same Defendants' Exhibit "J," which is in the words and figures following, to wit:

"Merchants' hotel, A. A. Allen, proprietor, cor. Third & Jackson Sts.

"ST. PAUL, MINN., *July 16th*, 1882.

"Mr. Wm. F. Patrick.

"DEAR SIR: I was quite ill soon after you left St. Louis, and almost the last business I attended to was to aid Mr. Howell in getting Flynn started for Denver, thinking that you & Patterson, could then manage Flynn & Zoble, I fear from the tone of your letter you have found it impossible to do so. When I came out of the woods, I found your letter of June 22d, waiting my answer, & I telegraphed you on same day accepting your proposition, to surrender to you all my remaining interest in the property adjoining the A. Y. on your surrendering my note; & on a perusal of your subsequent letters received here at St. Paul to-day I learn that is your wish; I do not complain of it. My judgment differs from yours as to the course to pursue, & I should not stand in your way & will not; if you wish any papers signed send & I will sign them, my address is Bayfield Wis. As to the Colorado Prince matter I received a letter from Mr. L. N. Buck, that is quite a surprise to me. I thought it was definitely understood that you would have a resale of the property, properly made so as to make a title thereto, it can certainly be done. Thomas or Patterson will tell you so. I conferred with Mr. Howell & gave him a letter to you informing
511 you that I had concluded to let Mr. Howell buy in the property, of course to be held for the use & benefit of the consolidation, which I still think will be finally carried out Please to see Mr. Howell & Mr. Buck & have at least this part of the program carried out properly, for if you & Howell thus obtain & hold title & possession it is the key of the situation.

"Yours truly, FRANK J. BOWMAN."

269 Q. What did you do on receipt of the letter just introduced in evidence and marked Defendants' Exhibit "J"?

A. On receipt of that letter I decided to accept the proposition contained in the letter, and instead of applying to the owners for a new contract, as I had intended on July 5th when I wrote to Bowman, I decided to accept the proposition that was contained in Bowman's letter of July 06th. I had a contract prepared such as he indicated he would sign in that letter, and that contract was prepared by C. C. Parsons, and I sent that contract to him by mail after signing it myself.

270 Q. I now call your attention to a paper-writing which purports to be a memorandum of agreement made and entered into on the — day of ——, 1882, between Frank J. Bowman, of the city of St. Louis, Missouri, and William F. Patrick, of the city of Leadville, State of Colorado, and which is signed by William F. Patrick and witnessed by E. A. Reynolds, and which has heretofore been introduced by the plaintiff and marked Plaintiff's Exhibit No. 28, and ask you to examine the same and state whether

or not that is the draft of the agreement that you referred to in your last answer.

A. Yes; that was substantially a true copy. I think I saw the original in St. Louis some time ago.

271 Q. You may state, if you know, when that agreement or paper was prepared and when it was mailed to the plaintiff and where.

512 A. My best impression is that it was mailed within a few days after the receipt of Bowman's letter of the 16th of July, and it was mailed to him at Bayfield, Wisconsin, and I know it must have been mailed before, at the very latest—before the 8th of August, because in looking over my papers I find a letter that I had written to my wife——

(Mr. McGINNIS:) Hold on, now; don't run in anything that you wrote to your wife.

(Mr. PARSONS:) That is competent to refresh his memory.

(By the WITNESS:)

A. I will just change that, then, and say they must have been mailed before August 8th.

272 Q. Have you any memorandum or paper which enables you to state that the draft of contract that you have referred to was mailed to the plaintiff before the 8th of August, 1882?

A. Yes; I have.

273 Q. Are you enabled to state definitely that it was before the 8th of August, 1882, that you mailed the draft of contract which you have mentioned, before the 8th of August, 1882?

A. Yes.

274 Q. Where was it mailed?

A. Mailed from Leadville.

275 Q. Was it deposited in the post office at Leadville, Colorado?

A. Yes, sir.

276 Q. Addressed to whom?

A. Frank J. Bowman, Bayfield, Wisconsin.

277 Q. Was there any letter enclosed in the envelope in which you transmitted the draft of contract that you have spoken of?

A. I am not definite in regard to that. I think it must have been, although the contract itself was signed by me before sending it.

278 Q. Then your recollection is that the contract or draft of contract sent by you and which you say embodied the substance of the proposition contained in Bowman's letter of the 16th of

513 July, 1882, was mailed to Bowman between the 20 or 21st of July, 1882, and the 8th of August, 1882?

A. Yes; I am positive it was before the 8th of August, and my best impression is it was shortly after the receipt of the letter. I took that letter of Frank J. Bowman, of July 16th, to C. C. Parsons and submitted it to him, and from that letter he drew this contract.

279 Q. After the transmission or after the mailing of the draft of contract referred to by you what did you do in regard to the further

development of the Col. Sellers and Accident mining claims under your contract known as Defendants' Exhibit "A"?

A. I worked, continued uninterruptedly, right along.

280 Q. At whose expense?

A. At the expense of myself and John Livezey, Jr.

281 Q. In proportion to your respective interests?

A. Yes; at the time the first contract was closed, which was about the 10th or 12th of May, I presume, up to this time I paid all the expenses—that is, I paid seven-eighths of the expenses and Livezey from time to time paid one-eighth of the expenses.

282 Q. Had Bowman, from the 17th of February, 1882, down to the time when you say you mailed said draft of contract to him at Bayfield, Wisconsin, paid anything towards the performance of the contract of February 17th, 1882, except the credit you had given him for $264.23 that you had given him credit for in the settlement of the 19th of June, 1882?

A. No; he had not paid anything except that, and, as I stated before, he gave me his note on the 19th of June, and at this time the note had not become due and it was not paid.

283 Q. What did you do with the note given by the plaintiff to you on the 19th of June, 1882, for $288.70?

A. I had it discounted in St. Louis.

284 Q. Where?

A. I sold it to T. W. McManus.

514 285 Q. Did you endorse it?

A. I presume I did; I haven't seen the note since that time—that is, since October, 1882—and I think the note was made payable to my order, and I think I must have endorsed it.

286 Q. After the receipt of the letter of the 16th of July, 1882, marked Defendants' Exhibit "J," and your acceptance of the proposition contained therein, and after the mailing of the draft of contract signed by you to the plaintiff at Bayfield, Wisconsin, what did you do in relation to the note given by Bowman to you on the 19th of June, 1882, and which is described in said letter of July 16th and also in the contract that you mailed to him at Bayfield, Wisconsin?

A. I paid that note—that is, I sent money to St. Louis, to the Fourth National bank, with instructions to them to go to the Bank of Commerce and take up that note; I sent my check to the Fourth National bank, check on the Bank of Leadville for $300.00, and they went around and took that note up, paid it, and returned it to me.

287 Q. Where were you when you sent the check for $300.00 on the Bank of Leadville to the Fourth National Bank of St. Louis?

A. I was in Knoxville, Tennessee.

288 Q. Did you receive any communication from the Fourth National Bank of St. Louis acknowledging receipt of your check for $300.00 on the Bank of Leadville and a statement of its application by the Fourth National Bank of St. Louis?

A. Yes; I received a letter from them.

289 Q. I now hand you a letter purporting to be written by G. A. W. August, assistant cashier of the Fourth National bank, St.

Louis, and addressed to you, and ask you if that is the letter dated September 16th, 1882, and ask you if that is the letter received by you acknowledging the receipt of your check for $300.00 and stating what disposition had been made of it.

515 A. Yes; that is the letter that is signed by G. A. W. August, assistant cashier.

290 Q. Are you acquainted with the handwriting of Mr. August?

A. I can't say that I am very familiar with it; I had some business with the Fourth National bank at different times and received several letters from him.

291 Q. Is that in his handwriting?

A. Yes; that is, I think, in his handwriting.

Counsel for defendants now offers in evidence the letter referred to by the witness in his last answer, and asks that the same be marked Defendants' Exhibit "K," which is in the words and figures following, to wit:

"ST. LOUIS, MO., *Sept.* 16, 1882.

"W. F. Patrick, Esq., Knoxville, Tenn.

"DEAR SIR: In answer to your favor of 14 inst. transmitting your check on Bank of Leadville $300, with instructions to pay note of F. J. Bowman in favor of yourselves, I have to state that your check on Leadville is passed to your credit less exch. 75c. with $299.25 and that we have paid the note referred to payable at the Bank of Commerce, not Commercial bank as you have it, falling due on 20th inst. $288.69 & int. $5.95, $294.64 and charged same to your acc't.

"The note is herewith returned as directed, with endorsement by the cashier of Bank of Commerce, that payment for same had been made by you on this date. Trusting that all this may be satisfactory, I remain yours very truly,

"G. A. W. AUGUST, *A. Cashier.*"

292 Q. State whether or not the note given by the plaintiff to you on the 19th of June, 1882, for $288.70 was returned to you after you had paid the same; and, if so, by whom.

Q. Yes; that note was returned to me by the Fourth National bank.

516 293 Q. Accompanied by the letter Defendants' Exhibit "K"?

A. Yes.

294 Q. Did you pay the interest that had accrued on said note up to the time that it became due?

A. Yes, sir.

295 Q. I notice by the letter introduced in evidence as Defendants' Exhibit "K" that the note was paid before it became due. Can you state why that was done?

A. Well, I did not remember the exact date when the note did become due, and I wrote the Fourth National bank and enclosed my check for $300.00, and did not remember perhaps the exact amount of the note and what the interest would be and just told them to go

to the Bank of Commerce and take the note up, and they went around as soon as they got my letter, apparently, and took it up before it became due and mailed it to me.

296 Q. Now, you may state whether or not that note dated June 19th, 1882, and given by the plaintiff to you for $288.70 was given in consideration, in whole or in part, for moneys advanced by the plaintiff to you for the purpose of working the Col. Sellers and Accident claims. I mean in advance of the expenditures being actually incurred in said work.

A. No; that note was given to me to pay for *what* his share of the expenses that had been incurred prior to the 19th of June, 1882.

297 Q. You may state whether or not you ever asked, demanded, or received any money from the plaintiff for expenses in working the Col. Sellers and Accident claims under your contract of the 17th of February, 1882, in advance of such expenses being incurred.

A. I say that I never received any. In March or April, 1882, I wrote to Bowman and asked him to send me, I think it was, $500.00, and that I would pay an equal amount so as to make a special fund from which the expenses incident to the working of this shaft
517 might be paid as they become due. Bowman, however, never did so, and I never received any money in advance, and that was the only time I ever asked him to advance any.

298 Q. Was anything said by the plaintiff in your settlement of the 19th of June, 1882, or any intimation by him that you were calling for moneys in advance of their expenditure?

A. Not a word. In fact, we had gone over this whole matter in May, 1882, in Leadville, at my house, and he knew the exact state of the account at that time.

299 Q. You may state whether or not on the 8th of May, up to the 8th of August, 1882, there had been any discovery of mineral in the Col. Sellers shaft that you were sinking under your arrangement with the owners thereof and under your arrangement with the plaintiff.

A. No; there had not.

300 Q. You may state whether or not up to the time that you mailed the memorandum of agreement to the plaintiff at Bayfield, Wisconsin, and up to the 8th of August, 1882, you wrote to the plaintiff that it would cost $9,000.00 in elaborate preparations for sinking the Col. Sellers shaft for the purpose of discovering whether there was any mineral in the claim or for the purpose of buying expensive machinery to further prosecute the work of discovering mineral or any representation like that in substance.

A. I have no recollection of any such letter, and I do not think I could have written any such letter, because at that time we had no intention of putting in any heavy machinery.

301 Q. Had you at that time struck any large volume of water which would necessitate the use of large and elaborate machinery in the sinking of your shaft?

A. No; no very large amount of water—that is, none but what we could handle quite readily with a bucket.

302 Q. You may state whether or not after the receipt of the

plaintiff's letter of the 16th of July, marked Defendants' Exhibit "J," you ever demanded of the plaintiff any proportion of the
518 costs and expenses of sinking the shaft upon the Col. Sellers claim or any other expense incident to the performance of the contract marked Defendants' Exhibit "A."

A. No; I never did.

303 Q. State whether or not after said date—after said time—the plaintiff ever wrote to you or inquired of you as to the progress of the work under your contract Exhibit "A" or inquired as to the expenditures in the performance of the same or made any other inquiry concerning your work under your contract Defendants' Exhibit "A"?

A. No; he never made any inquiry of the kind; the only communication I remember of having from him after mailing that contract was a letter of August 28th—that is, enclosing another contract.

(By Mr. McGinnis:)

304 Q. The only communication you got from him since what time?

A. Since the 16th of July.

(Mr. Parsons continues:)

305 Q. State when, if at all, you received the next communication from the plaintiff after you mailed to him the draft of contract which was mailed to him between the 20th or 21st of July and the 8th of August, 1882.

A. The first communication was a letter dated August 28th, 1882, and in that letter was enclosed a contract signed by the plaintiff. That letter and contract I received in Knoxville, Tennessee. They had been forwarded; they had been mailed to Leadville, and from Leadville forwarded to me at Knoxville, Tennessee.

306 Q. When did you receive that letter and contract?

A. I received that on the 7th of September.

307 Q. September, 1882?

A. Yes.

308 Q. I now hand you a letter purporting to be written by the plaintiff, addressed to you, which reads as follows: "Camp near Brule river, Aug. 28th, 1882. Mr. Wm. F. Patrick. My dear sir: I send you the contract you desire, & trust this will settle our
519 matters pleasantly & amicably. I have inserted a clause concerning your brother's interest but he may not care to retain it. My address will be St. Paul until Sept. 10th, then I shall return to St. Louis; business. Yours truly Frank J. Bowman. P. S. Mails are slow here," and ask you to examine the same and state in whose handwriting it is if you know.

A. It is in the handwriting of Frank J. Bowman; that is his signature.

309 Q. Is that the letter that you say was addressed to you at Leadville, Colorado, and was forwarded from there to Knoxville, Tennessee?

A. Yes, sir.

310 Q. And received by you on the 7th of September, 1882?

A. Yes.

Counsel for defendants now offers in evidence the letter last referred to and asks that the same be marked Defendants' Exhibit "L."

311 Q. I now hand you a paper purporting to be a memorandum of agreement, dated on the 28th day of August, 1882, signed by Frank J. Bowman, and ask you to examine the same and state in whose handwriting it is and whose signature is thereto attached.

A. That is the handwriting of Frank J. Bowman; it is his signature.

Counsel for defendants now offers said paper in evidence and asks that the same be marked Defendants' Exhibit "M," and which is in the words and figures following, to wit:

"Memorandum of agreement made and entered into this — day of —— A. D. 1882 by and between Frank J. Bowman of the city of St. Louis, State of Missouri, and Wm. F. Patrick of the city of Leadville State of Colorado, witnesseth; That whereas said above-named parties did on the 17th day of February A. D. 1882, enter into a certain contract in writing with Theodore C. Stebbins, Lyman Robison, Samuel J. Glover and Harvey Howard by the terms of which written contract the said Bowman & Patrick in consideration of the conveyance to them by said Steb-
520 bins & others above named, of the undivided one-half right title and interest in and to the 'Col. Sellers Lode' and the 'Accident' Lode mining claims, agreed to sink a shaft upon one of said mining claims to pay mineral or limestone in place, and whereas considerable work and development has been done and performed on said 'Col. Sellers' lode and the expense thereof has been borne principally by said Patrick, and said Bowman has been and is unwilling, to continue said work in such manner as said Patrick desires, or to pay any of the cost thereof if continued in such manner as said Patrick has directed, and whereas on the 19th day of June 1882 said Bowman executed and delivered to said Patrick his certain promissory note of that date for the sum of two hundred and eighty-eight dollars and seventy cents due ninety days after date and bearing interest at the rate of 8% per annum which note was for the full amount of said Bowman's proportionate share of the costs and expenses of working said Col. Sellers lode, which then remained due and unpaid, all previous amounts having been fully paid by him, and whereas said Patrick has negotiated and sold said note.

"Now therefore it is hereby agreed by the parties hereto that said Patrick will pay said note when the same becomes due and payable and save the said Bowman from the payment of the same or any portion thereof, and in consideration thereof the said Bowman will release and surrender to said Patrick all his remaining interest in and to the above-described contract so made with said Stebbins and

others and to the property described therein (reserving and excepting for the use of the brother of said Patrick a one-sixth interest in said contract if he shall elect to pay his assessments thereon).

"The said Bowman further agrees that on the payment of said note and the surrender of the same to him to execute and
521 deliver to said Patrick a good and sufficient deed of conveyance of his right title and interest in and to the mining property described in said contract and known as the the Col. Sellers and Accident Lodes mining claims situated in California mining district, Lake county, Colorado, and the said Patrick agrees on his part upon such conveyance to him to release said Bowman from any and all liability under said contract so made with said Stebbins *et al.* and to save said Bowman from any and all such liability.

"Witness our hands & seals this 28th day of August, 1882.

"FRANK J. BOWMAN."

312 Q. Is that the memorandum of agreement that you say that you received with the letter of August 28th, 1882, at Knoxville, Tennessee, on the 7th of September, 1882?

A. Yes; that is the one.

313 Q. When did you leave Leadville for Knoxville, Tennessee, in the summer of 1882?

A. I left on the 30th day of August.

314 Q. When did you arrive at Knoxville?

A. I went right through. I may have stopped over one day—that is, in St. Louis; I mean from morning until evening. I must have reached Knoxville about the 3d or 4th of September; I was in St. Louis on the 2d.

315 Q. When did you next see the plaintiff after the 31st of August, 1882, when you say you left Leadville for Knoxville, Tennessee?

A. The next time I saw the plaintiff was on the 19th of October, 1882.

316 Q. Where?

A. At his office, in St. Louis.

317 Q. Did you have any conversation with him at that time?

A. Yes.

318 Q. Did you receive any communication from him between the 28th of August and the time that you say you saw him on the 19th of October, 1882?

A. I do not remember any at all.

319 Q. What conversation did you have with the plaintiff
522 and what business transaction did you have with him on the 19th of October, 1882?

A. I went to his office with my brother, James M. Patrick, and I had that note of June 19th with me. The substance of the conversation was that I said to the plaintiff, Mr. Bowman, I have paid that note and have it with me and I would like to have the deed; I would like to have the deed as specified in your contract of August 28th; and we had some little talk in regard to my brother's in-erest, what should be done with that; also in regard to Livezey's interest. I told

him just to make the deed for his full quarter as it originall- stood to me and I would arrange for those two interests. He said, "All right;" he said, "I will make the deed to-day." I can fix the date definitely, because it is the date of the deed and also the wedding of a very intimate friend of mine, Mr. E. C. Jewett, of St. Louis, to whose wedding I went that afternoon.

320 Q. What was said in that conversation about your brother's interest?

A. Well, my brother was with me and we had some talk in regard to it. He said that there had been an assignment; that there had been a contract between the plaintiff and my brother, James M. Patrick, and he wanted some release of that, and my brother wrote a request or signed a request asking Bowman to convey that interest to me.

321 Q. Was that request written in your presence?

A. Yes; as I remember, it was.

322 Q. Was anything said in that conversation by you or by J. M. Patrick or by the plaintiff in your presence about the condition of the mine, of the Col. Sellers or Accident mines?

A. I do not remember that there was at that time.

323 Q. Was there anything said by the plaintiff or any inquiry made by him as to whether any mineral had been struck in the mine at that time?

A. No, sir; I think not. Our conversation was based en-
523 tirely upon the production of this note and also on the contract of August 28th, which was signed by Frank J. Bowman. The only thing that I undertook to do in that contract was to pay the note and return it to Bowman, and also to release Bowman from any further liabilities under the contract of February 17th, 1882. That I had done, and he made the deed.

324 Q. You may state who delivered the note of June 19th, 1882, given by the plaintiff to you and which you say you paid to the plaintiff on the 19th of October, 1882.

A. I did that.

325 Q. Who received the deed conveying the interest that the plaintiff then had in the property to you on the 19th of October, 1882?

A. My best recollection is that the plaintiff and I went around to Charles D. Green's office. He acknowledged the deed on the next day—that was on the 20th of October—and he delivered it to me.

326 Q. Was James M. Patrick on the 19th of October, 1882, or on the 20th of October, 1882, your agent for the purpose of delivering any note to the plaintiff or receiving any deed from him for you?

A. No, sir.

327 Q. Was the defendant James M. Patrick authorized by you to make any representation as to the condition of the mine or as to its future to the plaintiff on the 19th of October or at any other time?

A. No, sir.

328 Q. Was anything said by James M. Patrick in your presence

to the plaintiff to the effect that you, Will, was simply taking your chances on the future of the property; that nothing had yet been discovered, or anything in substance like that?

A. I do not remember anything of that kind.

329 Q. Would you remember it if it had taken place?

A. Yes.

330 Q. Was any inquiry made by the plaintiff at that time, on the 19th or 20th of October, 1882, concerning the condition of the work being done in the Col. Sellers mine or the discovery of
524 any ore therein?

A. No.

Counsel for the plaintiff waives the introduction of the deed from the plaintiff to the defendant William F. Patrick, conveying said Bowman's interest in the Col. Sellers and Accident mining claims, for the reason that the same has been heretofore introduced in evidence by the plaintiff.

331 Q. At the time that you or about the time that you received the deed from the plaintiff last referred to did you have any arrangement with him by which you assumed the obligations of the plaintiff to your brother, James M. Patrick, which obligations grew out of the contract between the plaintiff and said James M. Patrick?

A. Yes; I assumed these obligations at that time to James M. Patrick.

332 Q. I now hand you a paper purporting to be a memorandum of agreement between James M. Patrick and Frank J. Bowman, dated the 25th day of March, 1882, and ask you if you know in whose handwriting said contract is.

A. No; I do not.

333 Q. Do you know in whose handwriting are the signatures to it?

A. Yes; I recognize those two signatures; one is the signature of Frank J. Bowman, the other James M. Patrick.

334 Q. Are you acquainted with the handwriting of both?

A. Yes, sir.

335 Q. I will call your attention *on* a memorandum written on said contract, which reads as follows: "Having acquired by purchase the interest from Frank J. Bowman in the within-described property, I hereby assume his obligations under the within contract. October 1st, 1882. (Signed) W. F. Patrick," and ask you to state the history of that writing to which your signature is attached.

A. Well, we talked this matter over on October 19th, and agreed on this thing—that is, that I should assume Bowman's lia-
525 bilities under this contract, and on the 20th day *was* the deed from Frank J. Bowman to myself was acknowledged, and on the 21st Bowman wrote this condition to the contract, these words that you have just read, and I signed them.

336 Q. When did you first know of that contract?

A. The first intimation I had of it was shortly after it was made. My brother James Patrick wrote to me that he had made some arrangement with Bowman that he was to have—I do not remember

whether he stated specifically what he was to have or not, but he made some arrangement with Bowman, and Bowman mentioned it in one of his letters to me.

337 Q. Did the plaintiff mention this contract in that conversation with him at the time of that settlement of the 19th of June, 1882?

A. Yes; we talked of this matter. On the 19th of June I cannot recall whether it was talked of at that time or not. I knew of it previous to that time.

338 Q. Was anything said in your conversation with Bowman on the 19th or 20th of October about the interest in the contract of the 17th of February, 1882, which he had assigned to W. H. Wilson, and which said Wilson had assigned to John Livezey, Jr.?

A. Yes; that was. I told him that if he would make a deed to me of the full quarter that he had acquired under the contract of February 17th, 1882, that I would on my return to Leadville take care of that interest and make a deed to Livezey.

339 Q. What did he say?

A. He said that was all right.

340 Q. Did you on your return to Leadville after the 21st of October convey to Livezey the interest which he was entitled to under the Wilson contract which had been assigned to him?

A. Yes; I did within a few days after my return.

341 Q. Do you know where the original deed is?

A. No; I do not. I presume it is in the possession of Livezey.

526 342 Q. Do you know what interest you conveyed to Livezey in the Col. Sellers and Accident mining properties at that time?

A. Yes; I conveyed a one-sixteenth interest.

343 Q. Do you know when you conveyed it?

A. I conveyed it in November, 1882.

Counsel for defendants now offers in evidence a certified copy of the deed from the defendant William F. Patrick to John Livezey, Jr., conveying an undivided one-sixteenth part of the Col. Sellers lode, ledge, or deposit, and an undivided one-sixteenth part of the Accident lode, ledge, mine, or deposit, situate in California mining district, county of Lake and State of Colorado, and asks that the same be marked Defendants' Exhibit "N," as follows, to wit:

This indenture made this — day of November in the year of our Lord one thousand eight hundred and eighty-two, between William F. Patrick of the county of Lake and State of Colorado, party of the first part, and John Livezey Jr., of the county of Lake and State of Colorado, party of the second part, witnesseth,

That the said party of the first part, for and in consideration of the sum of five thousand dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever

quitclaim unto the said party of the second part, and to his heirs and assigns:

The undivided one-sixteenth ($\frac{1}{16}$) part of the "Col. Sellers" lode, ledge or deposit, and the undivided one-sixteenth ($\frac{1}{16}$) part of
527 the "Accident" lode, ledge or deposit, both of said lodes situate on the southeast slope of Iron hill north side of California gulch and between the "A Y" mine and the Oro schoolhouse in California mining district in the county of Lake and State of Colorado. For a full description of said "Col. Sellers" and "Accident" lodes, reference is hereby made to the location certificate thereof which are of record in the office of the recorder of deeds of said Lake county Colorado. The Col. Sellers lode is recorded in Book O on page 44. The "Accident" lode is recorded in Book "S" on page 86.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges, and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the said party of the first part, of, in and to the said premises and every part and parcel thereof, with the appurtenances: To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

W. F. PATRICK. [SEAL.]

Signed, sealed, and delivered in presence of—

——— ———.

STATE OF COLORADO, } ss:
County of Lake, }

I, O. F. Heckelmann, a notary public in and for said county, in the State aforesaid, do hereby certify that W. F. Patrick,
528 personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth. Given under my hand and notarial seal this 6th day of November, A. D. 1882.

[NOTARIAL SEAL.] J. W. JACQUE, *Recorder.*

STATE OF COLORADO, } ss:
County of Lake, }

I, F. M. Reardon, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that the within and foregoing

is a true and correct copy of mining deed No. 44844, as appears of record in my office in Book 81, page 565.

Witness my hand and official seal this 16th day of November, A. D. 1887.

F. M. REARDON,
Clerk and Recorder,
By F. M. BURRELL, *Deputy.*

344 Q. I now call your attention to the answer of the plaintiff to question No. 51 of his direct examination, in which the plaintiff says: "This was about October 19th, 1882, and I am sure that James M. Patrick carefully refrained from intimating to me that there had been any discovery of ore at the time of procuring the transfer," and ask you whether any such thing occurred to your knowledge at any interview that you had with the plaintiff in October, 1882.

A. No, sir.

345 Q. Or with your consent?

A. No.

346 Q. I now call your attention to the answer of the plaintiff to question No. 72 of his direct examination, in which he says in reply to the following question: "What did you get for the conveyance of your interest in the Col. Sellers and Accident mines to William F. Patrick? A. What was represented to me to be the value of my share of the old machinery there was there that could be utilized to go on and operate the mine," and ask you whether you made any such representation to him or whether the value of the old machinery there was to be utilized to go on and operate the mines was the consideration for the conveyance by Bowman to you on the 19th or 20th of October, 1882.

529

A. No, sir; there was nothing said about old machinery. The consideration that Bowman got was the same consideration mentioned in our interview of the 19th of June, also in my letter of June 22d, also in the draft of contract that I sent to Bowman and the draft of contract of August 28th that he sent to me—that was, that I should pay that note and return it to him.

347 Q. And also the letter of July 16th, was it not?

A. Yes; Bowman's letter to me of July 16th, 1882. Another part of the consideration was that I should release him from any further liabilities under that contract of the 17th of February, 1882.

348 Q. I now call your attention to the answer of the plaintiff to question No. 191 of his cross-examination, in which he states as follows: "I was no- versed in the time-contract law of Colorado, of making time the essence, and Mr. Patrick explained that matter to me, as he had a good deal of experience in it," referring to the clause in the Wilson contract of May 6th, 1882, in which time was made of the essence of the contract, and ask you whether that clause was put into the contract at your suggestion, and whether or not you explained the matter to him and stated that you had a good deal of experience in it.

A. I do not think that could have been the case. Mr. Bowman was an attorney himself, and it was hardly necessary that I should explain legal terms to him.

349 Q. State whether or not it required the sum of $9,000.00 to place the Col. Sellers mine -n a paying bases after the 19th of June, 1882.

530

A. Yes; it required $9,000.00 and a good deal more.

350 Q. Can you state how much was expended after the 19th of June, 1882, or between the 19th of June, 1882, and the 19th of October, 1882, in developing the mine?

A. Yes, I can by reference to some memorandum I have.

351 Q. Let us have the amount.

A. Do you want to know the aggregate amount?

352 Q. Yes.

A. Well, between those two dates—that is, the items not included in our settlement of June 19th, 1882—that is, the settlement of Bowman and myself—Livezey and I paid $7,639.43, and, in addition to that, when I returned from St. Louis at that time the mine was in debt; my share of that indebtedness was $1,011.45, which I afterwards paid, which would be added to that, making in all——

(By Mr. McGINNIS:)

353 Q. What was that indebtedness—the total?

A. The first amount that I gave you?

(By Mr. McGINNIS.)

354 Q. No; the indebtedness.

A. I do not remember the total indebtedness. I paid $1,011.45. I could only get that by reference to the books of the company; that makes in all $8,650.88.

(Mr. PARSONS continues:)

355 Q. When was the first shipment of mineral from the Col. Sellers or Accident mines made by you?

A. The first shipment was made in March, 1883. I can fix the exact date of that if you would like it.

356 Q. That is near enough. Can you state the total expenditures that were made bylyou and your co-owners before mineral was shipped from the Col. Sellers or Accident mines?

A. No; I can't give them now.

357 Q. Can you state approximately?

A. Well, it was over twenty thousand dollars, and at that time we were considerably in debt also; those debts were afterwards paid. I do not remember now the exact amounts.

531

358 Q. In the draft of contract that you say you sent to Frank J. Bowman between the 16th of Jule and 8th of August, 1882, and also in the memorandum of agreement written by Bowman and dated the 28th of August, 1882, occur the following words: "And the expense thereof has been borne principally by said Patrick." Will you please explain what is meant by those words?

A. That means exactly what it says. I paid all the expenses

from after the 8th or 10th of May up to the time that the contract was drawn—that is, I paid seven-eighths and Livezey paid one-eighth. Bowman paid nothing between that time except the amount he paid on the 19th of June.

359 Q. What is meant in said drafts of contract by the expression "That said Bowman has been and is unwilling to continue said work in such manner as said Patrick desires, or to pay any of the cost thereof if continued in such manner as said Patrick has directed"?

A. The meaning of that was that Bowman was unwilling to continue the work as I directed—that is, to push the work down to mineral and get there as quick as possible to beat the jumpers to mineral. He had expressed himself on two or three occasions as unwilling to do that, and when he wanted first to get an injunction I told him that I consulted Col. Bissell in regard to it; that we could not get an injunction at that time, and afterwards, in June, he advised me to do only a little work every ten days.

360 Q. What would have been the effect of working the property as you were advised to do by Bowman and as he wished it done, namely, doing a little work every ten days?

A. The effect would have been that the jumpers, as we call them, would have beaten us to mineral, as we had no valid discov-
532 ery of ore on the Sellers, and if they had got there first they would have owned the property, probably.

361 Q. State whether or not after the receipt of the letter of the plaintiff's, dated July 16th, 1882, you treated him as being a partner of yours any further.

A. No, sir. After the receipt of that letter and my acceptance of it, as indicated in the contract which I forwarded to him, I considered that he was entirely out of the contract and never made any demand on him for further funds. The last demand I made on him was on the 5th of July, 1882.

362 Q. At that time that you received the letter of July 16th, 1882, and at the time that you mailed to him the contract signed by you to Bayfield, Wisconsin, had you discovered any mineral of any kind in any of the workings of the Col. Sellers or Accident claims?

A. No.

363 Q. State how soon after that contract was mailed to the plaintiff, at Bayfield, Wisconsin, you discovered anything that looked like mineral in either the Col. Sellers or Accident claims.

A. The first discovery we made was a little streak of mineral; it was mostly iron pyrites. It was on the 13th or 14th of August, 1882. That was quite a narrow seam and some of the owners of the mine wanted to follow that at the time, but I was opposed to it and we continued sinking the shaft and passed through it, and in a day or two after that we had nothing in sight in the shaft except porphyry.

364 Q. Was the small seam of iron pyrites that you say you discovered about the 13th or 14th of August, 1882, any indication of the presence of mineral near the shaft?

A. Yes; it might have been. As I said, some of the owners were

in favor of following this and continue sinking the shaft straight down.

365 Q. Was the discovery you mentioned of any value?

533 A. No, sir; it was not. It was but small and too low grade to be of any consequence.

366 Q. I will ask you how much experience you had as a miner.

A. Well, up to that time I hadn't had a great deal; I had been mining for two or three years only. I have been mining ever since that time, however. I have been at it seven or eight years now.

367 Q. What is your profession?

A. Mining engineer.

368 Q. Are you an assayer?

A. Yes, sir.

369 Q. How long had you been following the business of assaying?

A. I had been assaying since 1876 up until—most of the time up to about the fall of 1880—I quit assaying.

370 Q. Now, you may state from your experience as an assayer and miner whether or not the small seam of iron pyrites that you have mentioned occurs frequently in the porphyry rock in this camp.

A. Yes; it is quite frequently found.

371 Q. You may state whether or not the discovery of such small seams of porphyry such as you discovered adds any to the value of a mining claim or is any indication that a large body of mineral or mineral in paying quantities is near to it.

A. No; it does not. When you find these streaks you might not find anything near them at all.

372 Q. Is the discovery o f these small seams of pyrites such as you have described any indication to you that the work of development of the property and the prospect of reach- pay mineral is near at hand?

A. Not always; no, sir. I will state at this time that we were all—when we started that shaft—Bowman and myself and the owners of the Col. Sellers as they stood of record at that time—we were all confident at that time that we would strike carbonate ore; we had no expectation of striking the sulphide ore that we did get.

534 373 Q. Was or was not the discovery of carbonate ore at that time the thing that gave value to mining claims in this camp?

A. Yes, sir; at that time you might say nothing was known of these sulphide ores; nobody knew the value of them, and when we first struck them there was no market for them; the smelters were not prepared to handle them.

374 Q. Was it your object in sinking that shaft to reach the carbonate ores that were found in this community?

A. Yes; we confidently expected that.

375 Q. You may explain what is meant by sulphide ores.

A. What is meant by sulphide ores is an ore which carries a

mineral in the form of sulphide—that is, a combination of the—either lead, iron, or zinc, as it happens up here, with sulpher.

376 Q. You may state what the cost of treating sulphide ores such as was contained in the small seam that you discovered in the porphyry on the 13th or 14th or August, 1882, was at that time in this camp.

A. At that time the cost of treatment was very high; it was in the neighborhood of $25.00 or $30.00 per ton.

377 Q. What was the value of the ore that you found in the small seam that you have mentioned on the 13th or 14th of August, 1882?

A. I cannot recall now; it was quite low, though; it was too low to be shipping ore at that time.

378 Q. Would it pay the cost of mining it?

A. No; it could not be taken out and sold at that time to a profit.

379 Q. Would it pay treatment charges?

A. No, sir.

379½ Q. Did you consider it of sufficient value at the time that you discovered it to follow it?

A. No, sir; I went straight on down.

380 Q. Now, you may state when, if at all, you reached a body of ore in the Col. Sellers shaft.

535 A. We had the first indications of that body of ore on the 30th day of August, 1882; at least so I was told by the foreman of the mine at that time—that is, the head contractor, J. D. Drummond. I did not see it at that time. I went to the mine on the 30th day of August, 1882. He told me he struck what he thought was the main body of ore, and as soon as he cut it the water came in so badly that he had to leave the shaft.

381 Q. And you did not examine it at the time?

A. I did not see it that day; no sir.

382 Q. Did you see it before you started for Tennessee?

A. No; I left the same evening, and did not see it until I returned, the latter part of October, 1882. I cannot say that I saw it in October; I cannot fix definitely the date; I am not sure that I saw it before February or perhaps the 1st of March, 1883. We had a great deal of trouble with water between the 30th of August and the time we made our first shipment.

383 Q. Did you find it necessary to incur additional expense to handle the water that was struck on the 30th of August, 1882?

A. Yes; during the time that I was away, between the 30th of August and, say, the 25th or 26th of October, when I returned, they, in the first place, my partners who were here, undertook to handle the water with a large bucket, and when they found they could not do that they put in a steam pump and the steam pump was too small; they had to take that out after running to some expense for a week or so, and then they put in a steam, an old-fashioned Cornish pump that hadn't power enough, and after my return we decided to put in a regular Cornish pumping plant, which we did. It took some time; there was heavy foundations to make, and we

built a shaft-house over this and got to work, I suppose, the latter part of February, 1883, as near as I can fix the date now.

536 384 Q. You may state whether or not, in the summer of 1882 and after the receipt of the letter of the 16th of July, 1882, from the plaintiff, you offered the interest that you would acquire from Bowman to any person; and, if so, at what price.

A. I offered that interest, as I have stated, to Col. J. B. Bissell on the terms that we had talked about—that is, Bowman and I had talked about. He was to pay the note that was given to me on thaday, the 19th of June, 1882, and take the interest and assume all liabilities and provide for the debts that might accrue on it.

385 Q. Did you offer it to any other parties?

A. Between what dates was your question?

386 Q. After the receipt of the letter of July 16th.

A. I do not remember of offering it to anybody else on those terms.

387 Q. Did you offer it to Major Whiting?

A. Yes; I did have some talk with Major Whiting in regard to it. I can't recall the terms on which I offered it to him. I think the terms were—yes, the terms were, I remember now, he was to pay all the debts that had accrued on that interest between the time—that is, between June 19th, 1882, and the time I offered it to him. I do not remember when it was exactly. I think it was just after my return from the East at that time, which would be the latter part of October.

388 Q. Do you know anything about the purchase of any interest in the claim in July, 1882?

A. Yes; I know that Whiting purchased an interest at that time from Stebbins; J. C. Whiting from T. C. Stebbins.

389 Q. Do you know what he paid for it?

A. He purchased a one-sixteenth, and was to pay for it $500.00 at the time, and took a deed each time for a sixty-fourth; that interest was part of Stebbins' interest; was not subject to any

537 expense of sinking the shaft; that, under the contract, was—the contract of February 17th, 1882—was to be borne by Bowman and myself.

390 Q. Then the interests purchased by Whiting and Gerhardt were purchased from the owners of the claims with whom you and Bowman contracted?

A. Yes, sir.

391 Q. And the interests then purchased was not subject to the payment of any expenses in developing the property, were they?

A. No; under that contract we were to pay the expenses of sinking the shaft and also of getting a patent, which involved the taking care of these adverse suits which had been filed, and the interest that Whiting got was entirely relieved of this expense.

392 Q. Then the interests purchased by Whiting and Gerhardt was worth more than an interest purchased from either you or Bowman?

A. Yes; it would be.

393 Q. Because it was burdened by the performance of that contract?

A. Yes.

Whereupon the taking of testimony was adjourned until the hour of 1.30 p. m. of Nov. 22d, 1887.

At the hour of 1.30 p. m. of November 22d, 1887, the further taking of testimony was continued.

WILLIAM F. PATRICK, direct examination of, resumed by C. C. PARSONS, Esq.:

394 Q. When was your partnership with the plaintiff in the working of the Col. Sellers and Accident mining claims under the contract, Defendants' Exhibit "A," terminated?

A. It was terminated, as I regarded it, on the receipt of the plaintiff's letter of July 16th and by my acceptance of the proposition contained therein and the forwarding of the contract which was prepared by C. C. Parsons.

395 Q. And mailed to him where?

538 A. Mailed to him at Bayfield, Wisconsin.

396 Q. Why did you accept the proposition contained in the letter of the 16th of July, 1882, which you received from the plaintiff upon your telegram of withdrawal of the proposition of the 15th of July, 1882?

A. I have stated part of my reason was that I was advised by Col. Bissell to ask the owners of the Col. Sellers, Robison, Stebbins, and others, to give me a new contract, leaving out Bowman entirely in case he didn't pay that draft of July 6th, and it was my intention of doing so up to the time of receiving Bowman's letter of July 16th. After receiving that letter I thought it would be easier and better, and to avoid any further complications if I accepted the proposition that was contained in that letter, so I did so.

397 Q. I now call your attention to the answer of the plaintiff to question 319 of his cross-examination, which reads as follows: "Question. And then this disagreement that is recited in the contract of the 17th of February, 1882, to which I have called your attention, refers to the difference of opinion between you and Mr. Patrick as to the sinking of the shaft on the Col. Sellers claim to the second cont-act? Answer. No; I didn't state that. I said I was not familiar enough with mining terms to know exactly what he proposed and could not recall from recollection, but I do recall it was a proposition on his part to spend some $9,000.00 in money in elaborate preparations that had never been contemplated, and in his letter to me, as I now recall it, — would be necessary to determine whether there was any mineral or not, and that the representation came to me about the time or after the date I signed that contract," and ask you what is the fact in regard to the statement contained in said answer.

A. I do not remember to have made any such representations

to Mr. Bowman at that time; still, if I did, subsequent
539 events proved I was correct in the matter, because it did take $9,000.00 and more to put the claim on a paying basis.

398 Q. I now call your attention to the answer of the plaintiff to interrogatory No. 427, in which he says that he, meaning you, had forwarded to him, Bowman, by mail a printed statement of the amount necessary to carry out your idea of going on until you could discover mineral, a statement that seemed to him quite remarkable in view of the representations as to the cost made to him before he went fishing in June, and ask you whether or not you sent any such statement or what is the fact in regard to that.

A. I sent no printed statement. I sent a written statement to him July 5th, 1882, showing what had been expended up to that time, and that was the last statement I sent him.

399 Q. I now call your attention to the statement in the letter of September 2d, 1882, written by you to the plaintiff and which has been introduced in evidence by the plaintiff in this case, which is marked Plaintiff's Exhibit No. 22, and in which occurs these words: "I sent you from Leadville an agreement concerning the Col. Sellers, in which I agreed to pay that note, $288.70, and you relinquish all rights under the agreement. The shaft is still going down. The note will be due about November 19th, which please sign agreement so that I may manage to take up the note," and ask you whether the statement therein contained, "the shaft is still going down," was true.

A. Well, I do not think it was true. At that time I believed it was going down, and I learned afterwards that they had so much water that they were not doing anything in the shaft.

400 Q. That was while you were in Tennessee?

A. I wrote that letter from St. Louis. It was two or three days after I left here.

401 Q. Was the agreement referred to in that letter which you say you sent him from Leadville the agreement that was for-
540 warded to him by mail as the acceptance of his proposition contained in the letter of July 16th, 1882?

A. Yes, sir.

402 Q. What was the object of writing to him at that time to send you the agreement?

A. Well, because I wanted to get the agreement. I had accepted his proposition as contained in his letter of July 16th and had forwarded this agreement, and I thought he had plenty of time to have sent it and returned it to me before I left Leadville.

403 Q. And desired to get it in formal shape?

A. Yes.

404 Q. State when, if you know, you received a deed from the owners of the Col. Sellers and Accident mining claims for the undivided one-half interest in the Col. Sellers and Accident claims.

A. I received that deed—was executed or made and executed at the same time that this contract of February 17th was and remained in escrow as provided in the contract with C. C. Parsons. I received the deed on my return from the East at that time, which was about

the latter part of October or 1st of November. I recorded the deed on the 6th of November, 1882.

405 Q. Then it was delivered to you on your return from St. Louis, was it?

A. That is my best recollection of it; yes, sir.

406 Q. How often and at what times did you meet the plaintiff in this suit after the 21st of October, 1882, and until the commencement of this suit?

A. Since that time I have not any recollection of having met him until the day this suit was commenced. To the best of my recollection, he has not been in Colorado since May, 1882. I do not remember to have met him at St. Louis, although I may have done so; I am not positive. I met him in the Southern hotel on the day this suit was commenced—the date I was served with notice of this suit.

407 Q. I now call your attention to the statement of the
541 plaintiff in his answer to question No. 124 of his cross-examination, in which he states that you represented W. H. Wilson to him as a kind of bogus character, and that he (Bowman) did not know him except upon this representation as a bogus fellow without money who was around town and would not pay for anything. You may state what the fact is in regard to that representation.

A. That representation I do not think can be true, because the first time I met Wilson I was introduced to him by Mr. Bowman; it was over here in the Clarendon hotel. At that time Bowman stated that he had met Wilson in St. Louis.

408 Q. Did you know anything about Wilson at that time?

A. No; that was the first time I ever heard of him, when I was introduced to him by Mr. Bowman.

409 Q. I now call your attention to the question No. 297 of the plaintiff's cross-examination and his answer thereto, which reads as follows: "Q. Did you instruct the Boatman's Bank of St. Louis to honor or pay Patrick's draft for either the sum of $280.69 or $465.00 during the month of May, 1882? A. I have no recollection as to the amounts you mention. I have stated the extent of my recollection of the matter, that when the moneys were wanted he should draw, allowing certain credits, and my recollection is that he drew for a larger amount than I thought he was entitled to and that we had some telegraphic correspondence. At last I telegraphed him to make proper rebates, so that I could have the draft paid," and ask you whether or not you ever received such a telegram as is referred to in that answer.

A. No; the only telegram that I received in regard to that was in which he said, "Must know Wilson's conclusion; rebates not satisfactory." That was the only telegram in regard to that.

410 Q. I call your attention to question No. 349 of the plaintiff's cross-examination and the plaintiff's answer thereto, which reads
as follows: "Q. Now, in your letter of May 15th, 1882,
542 to William F. Patrick you say your brother's interest I agreed to carry and am willing to. What is meant by that? A. My recollection would be as I have stated; that after William has

informed me that there was no probability that Wilson would pay anything that Wilson had or would be forfeited out, as he had assured me on May 6th there was no question as to it, that I stated if Jim wanted to take an interest, either a third or a fourth, that I would not object; that I would consent he might do so, and if Will wished to be carried during his payments, or something of the kind, or for some time, I don't know but I objected, but I have no distinct recollection that I objected, but I would say from this letter I probably agreed to carry or to make some advances for him until he got his money," and ask you whether or not the plaintiff stated to you that if Jim wanted to take an interest, say a third or a fourth, that he would not object at the time stated by the plaintiff in that answer.

A. No; not at that time—that is, when he was here. He refers to the time when he was here in Leadville, about May 6th, I presume. He didn't state anything about it at that time, and at the time he wrote that letter, May 15th, he did not know that Wilson had not paid, because I did not write to Bowman until May 21st that Wilson had not paid. I stated in the conversation that we had here in Leadville May 6th or 8th that I did not think at that time that Wilson would pay.

411 Q. Had the contract between Bowman and J. M. Patrick, by which Bowman assigned an interest in the contract to J. M. Patrick, been made at that time?

A. Yes; I knew that there was a contract of some kind between them, but I hadn't seen the contract at that time.

412 Q. Now you may state if you know the date of the location of the Accident and Col. Sellers mining claims.

543 A. The Col. Sellers was located, as I remember, on July 4th, 1879.

413 Q. By whom?

A. By Lyman Robison and T. C. Stebbins. The Accident claim was located about a year later. It was some time in 1880.

414 Q. February, 1880, it was?

A. February, 1880.

It is admitted by counsel for the plaintiff that the Col. Sellers Lode mining claim was located on the 4th of July, 1879; located certificate filed the 8th of July, 1879, at 2.30 p. m.

It is also admitted that the Accident Lode mining claim was located on the 20th day of February, 1880; location certificate filed February 21, 1880; that Lyman Robison and Theodore C. Stebbins were the locators.

Counsel for defendants offers in evidence a paper purporting to be an agreement between James M. Patrick and Frank J. Bowman, dated the 25th day of March, 1882, signed by Frank J. Bowman and James M. Patrick, with the endorsements thereon, *in evidence*, and asks that the same be marked Defendants' Exhibit "O," which is in the words and figures following, to wit:

"This memoranda of agreement witnesseth: That James M. Patrick has this day purchased from Frank J. Bowman a one-third of

his one-half interest in the property adjoining the A. Y. mine near Leadville Colorado, the same being the property acquired by contract with Stebbins and others, in which William F. Patrick is a one-half owner. The consideration of this agreement being the sum of one dollar, this day paid and the further consideration that said James M. Patrick is to pay a one-third of the cost to said Bowman in carrying out the contract for sinking a shaft on said premises,
544 that is to say, said Jas. M. Patrick is to pay a one-sixth of the total costs, and said Bowman agrees to make all necessary advances of money for said purpose, for one year, and save said Jas. M. Patrick, from the necessity of making advances during said period of time, and said Jas. M. Patrick agrees to well and faithfully repay to said Bowman in twelve months from this date, all sums so advanced by him on account of this contract and pursuant to the terms thereof. Signed in duplicate this 25th day of March, 1882.

FRANK J. BOWMAN.
JAS. M. PATRICK."

(Endorsement.)

"Having acquired by purchase the interest of Frank J. Bowman in the within-described property I hereby agree to assume his obligations under the within contract. Oct. 21st, 1882.

W. F. PATRICK."

Cross-examination by E. McGINNIS, Esq.:

X 1 Q. When did Bowman become your attorney in regard to the St. Louis mining claim matter?

A. In September or October, 1881.

X 2 Q. When did his relation to you as attorney in that matter end?

A. I could not fix the exact date; some time in 1882 he had gone to New York and fixed up a consolidation of the claims that I mentioned, the Colorado Prince and Miner Boy, and tried to fix up the dissentions that were among the owners and some of them objected to it, and some of the owners of the St. Louis would not go into the scheme and the matter was dropped; I could not fix the exact date when it was.

X 3 Q. About what time in 1882?

A. I think it must have been along in the summer, spring or summer, of 1882; I could not say positive, though.

X 4 Q. Was he not your attorney in other matters relating to mines?

A. No, sir; this was the only matter, in regard to the St.
545 Louis matter; there were quite a number of complications, but that was the only matter in which he acted as my attorney.

X 5 Q. Was he the attorney of your brother, your codefendant in regard to the same matter—the St. Louis?

A. Yes, sir; we were interested together in the St. Louis at that time.

X 6 Q. I will show you a letter dated Knoxville, Tenn., December 23d, 1881, addressed Dear brother and signed W. F. Patrick, and ask you in whose handwriting that letter is, it being Plaintiff's Exhibit No. 1, already offered in evidence.

A. (Examines letter.) That is my handwriting.

X 7 Q. So, on this date, Mr. Bowman was the attorney for yourself and brother James in regard to that St. Louis matter?

A. Yes; he was one of our attorneys.

Q. In that letter you say to your brother as follows:

"I wanted to see you however in regard to the St. Louis, and what I wanted was this, I think that Mr. Bowman is somewhat anxious to have a larger interest than he now possesses, and think he would be willing to buy an eighth as a speculation, and what I wished you to do was to see him without exhibiting any anxiety to do so, try to sell him that interest. I would start the price at about $15,000 or $18,000, but I think if you can get $10,000 in cash, it will be a mighty good sale. That will leave us a clear title to $\frac{3}{8}$ and the possibility of getting back the $\frac{1}{8}$ to Chase in 1878. My reason for thinking that amount a good bid for the property I could give you more fully in person, but briefly they are that Blow who was surveyor for the Colorado Prince at the time they were working and who was frequently in the mine and all th-ough it, says that at no time did they ever see any well-defined body of ore, and the fact that they have not done any work for so many months, rather confirms me in that belief. Blow says that in his judgment $15,000 would be a large price for our $\frac{3}{8}$. Another reason for my belief is that
546 the costs of the suit which amounted to only $538.00, were not paid till one day after the time set by the court, and a more convincing one if the fact that the miners at work in the Miner Boy at the time of my visit there had not been paid for three months, which certainly does not indicate a very healthy state of the mine. Mr. McKenzie and I while at the mine selected from a large pile of ore in the shaft-house two pieces of ore that we considered the best we could get. I had Fred. Bruen crush and assay them together and the -sult was 7 ounces silver and $\frac{3}{10}$ ounce gold to the ton. We may have been mistaken in making our selection but I don't think we were. For all these reasons I think it advisable to try Bowman and I think it better for you to do so than for myself, as you could represent to him that you were in need of money and we can divide afterwards if you get it." Did you not mean by that language that your brother James should go to Bowman, your and his attorney, and that in your opinion that property was a bad one, ore was of low grade; that $10,000 for an eighth would be a big price, and that you were informed by one you knew that $15,000 for three-eighths would be a big price, and also to say to Mr. Bowman that you had requested that it would be better for him to go to Bowman than yourself and to say that he was in need of money and ask Mr. Bowman $18,000 or $15,000 for an eighth, and that if Bowman would pay it that you and James would afterwards divide it between you?

Counsel for defendants objects to the question propounded to the

witness for the reason that the same is irrelevant and incompetent, and for the further reason that the letter is unambiguous and incates its meaning and does not require any explanation; further, that it has no relation to this suit and appears by its date as

547 having been made long prior to any partnership arrangement between the plaintiff and defendant William F. Patrick and long before the contract of the 17th of February, 1882, was entered into by the plaintiff and defendant.

A. That is a pretty long question. I do not know as I can answer it. The letter speaks pretty well for itself. Mr. Bowman had expressed, as I say in that letter, *I* wish to buy a certain interest in the St. Louis claim and I told my brother to go and try to sell it to him; if he could not get $15,000 to take $10,000.

X 9 Q. That is, at that time you and your brother were trying to put off on Bowman for $15,000 or $18,000, while he was your attorney in regard to that property and jointly interested with you in it, property that you knew was not worth that sum?

The question is objected to by counsel for the defendants for the reason stated in the objection to the last question.

A. No; I did not know that the property was not worth that sum. It was my opinion that it was not worth that sum.

X 10 Q. These facts that you stated in your letter to your brother James, was it not your intention to have that commuicated to Mr. Bowman?

The question was objected to for the reasons given above and, further, because it does not appear by said letter that the defendant William F. Patrick asked or suggested to his brother to make any false or fraudulent representations as to the value of the property, the sale of which he was to negotiate with said Bowman.

(The last foregoing question was repeated.)

A. I suppose the terms of the letter—that was left to his own discretion.

548 X 11 Q. Why did you stay in the background and tell your brother to get the money if he could and divide with you afterwards?

Question objected to for the same reason given above and for the further reason that it is an attempt to introduce parol testimony to explain a written paper that is unambiguous and does not require any explanation; and, further, that the intention of the witness has nothing to do and is not pertinent to the issues in this case.

A. Well, in regard to that I will say Mr. Bowman has been in Leadville only two or three weeks before that letter was written. He undoubtedly made a good many inquiries in regard to the value of the property, and he thought the property was valuable, and I wrote that letter to my brother, thinking that he could make a better trade with Mr. Bowman than I could.

X 12 Q. You were then perfectly willing to get $15,00– or $18,000 of Mr. Bowman while he held the confidential relations with you

jointly in the property for a property that you believed was not worth more than $5,000.00 or $8,000.00?

Question objected to as being totally irrelevant and immaterial and for the further reasons given above.

A. Yes, I was; if he wanted to buy it.

X 13 Q. When, if ever, after that date did you change your disposition in regard to dealing with Mr. Bowman in regard to confidential relations?

Question objected to, for it does not appear that any change such as suggested by the question was ever made, and that the question is totally irrelevant and impertinent.

A. I cannot say as to that. I always dealt fairly and squarely with Mr. Bowman in this Col. Sellers matter.

549 X 14 Q. You mean fairly and squarely with him in the same way that you were attempting to deal with him in that letter that you refer to?

Question objected to as being impertinent, irrelevant, and immaterial, and it being argumentative instead of calling for the statement of a fact.

A. I think I dealt fairly and squarely with him in that matter. He expressed a desire to buy and I was willing to sell.

X 15 Q. Then that was your idea of fair dealing?

Question objected to as not calling for the statement of a fact, as being insulting to the witness, and as being impertinent and irrelevant.

A. That was my idea of a trade. If I have anything to sell I will get as much for it as I can. I presume Mr. Bowman would act the same way.

X 16 Q. And you would buy the same way you attempted to sell?

Objected to as not calling for any facts pertinent to the issue in this case, and being an attempt on the part of counsel for the plaintiff to inject an argument into his question, and as being wholly foreign to the issues in this case.

A. When I bought I bought on Mr. Bowman's own proposition in writing.

X 17 Q. When did you first leave Leadville to go anywhere east from Leadville after you returned from St. Louis on the 19th of June, 1882?

A. Well, the first time I left was along in August; I think about the 1st of August; somewhere about the first of August I went over to Gunnison county with Col. Bissell.

X 18 Q. How long were you gone?

A. I was only gone a few days—four or five days, I guess.

X 19 Q. Were you absent from Leadville after you returned

550 from that trip any time, any other time during the month of August, 1882?

A. Not that I remember of until the last day of August; then I went East; that is the 30th day of August.

X 20 Q. Did you take your wife East for the summer of 1882?

A. No, sir; she went alone.

X 21 Q. When did you leave Leadville to go to St. Louis just prior to June 19th, 1882?

A. I can't fix the date; it was only a few days before the 19th; I stated that I was in St. Louis three or four days at the time and I left St. Louis, I think, on the 18th or 19th of June; I left St. Louis on the 19th of June.

X 22 Q. But when did you leave here to go to St. Louis?

A. I can't fix the exact date of that just now.

X 23 Q. About how many days before?

A. Six or eight days, I guess.

X 24 Q. So it would be along about the, say the 13th of June?

A. Yes; I presume so; about the 12th or 13th of June.

X 25 Q. Did you leave anybody in charge of the Col. Sellers shaft while you were gone on that trip?

A. It was in charge of the contractor who *were* at work sinking on the second contract; the second hundred feet.

X 26 Q. Anybody else?

A. No, sir.

X 27 Q. Did you receive any letters or telegrams from anybody in Leadville of what occurred in your absence in St. Louis on the 17th or 19th of June, 1882?

A. No, I do not remember of having received any.

X 28 Q. Where is that contract with Wilson? (Witness produces contract.) When did you first get knowledge or information of the contract between Bowman and your brother James—of the contract dated March 25th, 1882?

A. I think within a short time after the 25th of March my brother wrote me that he had some arrangement with Bowman; I
551 do not know as he stated specifically what it was, for a certain interest.

X 29 Q. Did you know that in that contract that Bowman had agreed to carry him or make advances for him for the first year of the assessment work?

A. I think I did.

X 30 Q. So you got it, you think, about the last of March, 1882—your information?

A. Yes; last of March or 1st of April.

X 31 Q. Then along in March, 1882, as is shown by your letters to Mr. Bowman already in evidence by Mr. Bowman, you were demanding before you had paid out a dollar that Mr. Bowman should send you $500.00, did you not?

A. No; I did not demand it; I suggested it. I told him that if he would send me—the understanding was that if he would send me $500.00 I would put $500.00 with it and make a special fund that the bills were to be paid out of.

X 32 Q. At that time Bowman had been traveling around the

country, to New York and here, in regard to that St. Louis claim, had he not?

A. Yes; he had made one trip to Colorado and Denver and Leadville. I came with him at that time. We left St. Louis about the latter part of November, 1881, and came out here and he went back, and soon after that he went to New York.

X 33 Q. So he first came out here with you in November, 1881?

A. Yes; the latter part of November, 1881.

X 34 Q. Then he went to New York?

A. Yes.

X 35 Q. Then he came back here again in February, 1882?

A. Yes; he came back again in February.

X 36 Q. Then again on May 6th, 1882?

A. Yes.

X 37 Q. Then, in connection with that business, he made three trips to Colorado and one to New York?

A. Yes, sir.

X 38 Q. Had you paid him his traveling expenses for the trip to New York and for the trip he made to Colorado in November 1881?

A. I paid his fare; as I remember, he obtained passes for myself and him in that trip in November from St. Louis to
552 Kansas City on the Missouri Pacific road, with which he was connected in some capacity at that time, and from Kansas City and Denver and Leadville I paid his fare. I also paid his hotel bill in Denver at that time, and my recollection is that I paid his hotel bill in Denver in May, and in May he stayed at my house in Leadville here, and in regard to the trip in February I am pretty sure that I also paid his fare at that time, because at that time he, myself, and wife came out from St. Louis together, and I paid his fare at that time, and also paid his hotel bill in Denver at the Windsor. He paid his own expenses on this trip that he took to New York.

X 39 Q. That was in the fall of 1881?

A. Yes; along—I am not positive whether it was in December, 1881, or January, 1882; it was along about that time.

X 40 Q. Did you pay his expenses on his return from Colorado, those three trips that he made there?

A. I can't say that I did. I am not positive; I may have. I found a memorandum some time ago where I advanced him some money; $50.00 along about that time; latter part of November.

X 41 Q. This sum that you state that you and he arrived at on May 6th or 8th, 1882, of $264.23, as balance that you owed him for traveling expenses. Was that the same sum that you allowed him in the settlement on June 19th, 1882, in St. Louis?

A. Yes, sir; that was the sum.

X 42 Q. You didn't go back with him from Leadville in May, 1882, to St. Louis?

A. No, sir.

X 43 Q. So he paid his own expenses back from that time on?

A. I can't say that he did. He may have put it in. He knew

approximately what it would be, and he may have put it in at that time.

X 44 Q. How did you figure out in making these traveling
553 expenses, part of which hadn't occurred?

A. That is $264.23. How did I figure it out?

X 45 Q. Yes.

A. I didn't figure it out. Mr. Bowman gave me a statement of it, and I took his figures for it.

X 46 Q. Where does the twenty-three cents come from?

A. I don't *no*, sir.

X 47 Q. Don't you know that the only way you got the $264.23 is by subtracting the $183.70 which you say Livezey was to pay from a certain sum and that is the remainder?

A. No, sir.

X 48 Q. And don't you arbitrarily state without knowing anything about it that the sum of $264.23 is traveling expenses?

A. No; that was the statement that Mr. Bowman made to me at the time.

X 49 Q. Then you swear that here in Colorado on May 8th, 1882, before this traveling expense had all been incurred and the matter was figured out here to the fraction of an odd cent?

A. Yes; I say that it was substantially agreed upon.

X 50 Q. I notice written on the back of this contract between Wilson and Bowman, which is put in evidence by your attorney, the following:

"LEADVILLE, COLORADO, *May 11th*, 1882.

"For value received I do hereby transfer all my right, title, and interest in and to the within contract to John Livezey, Jr.

"As witness my hand this day and date above written.

"(Signed) WILLIAM H. WILSON.

"Witness:

"W. F. PATRICK."

In whose handwriting is the body of this endorsement?

A. It is in the handwriting of William H. Wilson.

X 51 Q. From whom did this paper come into your possession?

A. I got that from John Livezey, Jr.

X 52 Q. When?

A. I got that some time last summer. I had a copy of it, and I asked him to give me the original, and he did so.

554 X 53 Q. Did you witness that transfer from Wilson to Livezey?

A. Yes; that is my signature.

X 54 Q. You put it there that day?

A. I presume so.

X 55 Q. You were present when it was done?

A. Yes, sir.

X 56 Q. Don't you know as a matter of fact that you were not aware of this assignment—transfer from Wilson to Livezey—for about three weeks after this date?

A. No; I do not. I do not think I would have witnessed it unless I was present when it was written.

X 57 Q. Don't you know that you have put this, "witness, William F. Patrick," on this paper since the commencement of this suit?

A. No, sir; I do not. I am positive of that.

X 58 Q. I now show you a letter dated Leadville, June 3d, 1882, addressed to William F. Patrick, and ask you if that is in your handwriting.

Counsel for defendants objects to the introduction of the letter proposed for the reason that notice has been served upon the plaintiff and his counsel to produce all the letters in his possession or under his control for the purpose of enabling the defendants to examine and inspect the same, which notice has been refused; and now, after such refusal to permit the defendants to examine and inspect the letters written by the defendant William F. Patrick to the plaintiff, counsel seeks to introduce letters covered by said notice.

X 59 Q. Is that your handwriting?

A. I will answer when I get through reading the letter.

X 60 Q. I still ask you if that is your handwriting.

A. Yes; that is my handwriting.

X 61 Q. Now, if it be true that you were present on the 11th of May, 1882, and then signed your name as a witness to the
555 transfer alleged to have taken place from Wilson to Livezey, I ask you why it is in this letter of June 3d, 1882, to Mr. Bowman you use the following language: "Major Wilson came to me this morning and told me he had transferred his interest in the Sellers contract to a man named Livezey and he wanted to pay his assessment."

Question objected to for the reasons above stated.

A. I can't recollect; I know I witnessed that paper whenever it was first called to my attention from the fact that it was dated May 11th; I feel confident that that was the date, but it may have been later even when I witnessed that; I know it was not since the commencement of this suit.

X 62 Q. That paper was not in your possession, as you say, until this past summer?

A. Some time this summer or spring I got it from Mr. Livezey; perhaps last fall; I am not positive about that.

X 63 Q. What reason would there be for you putting your name there as witness to that signature after June 3d, 1882?

Objected to for the reason that the question assumes that the witness placed his name on that paper after the 3d of June, 1882, which fact has not been proved by any statement of the witness or otherwise.

A. The letter itself shows the reason why I did that, I think; the letter says that I had refused to take the money because I had already notified Wilson that I had already notified Bowman that

Wilson hadn't paid and that I would not take the money, and I presume now that I must have witnessed that after I returned from St. Louis.

X 64 Q. You say you think now that you put that name there as a witness after you returned from St. Louis?

A. Yes.

X 65 Q. You didn't return from St. Louis until after the
556 19th of June?

A. No.

X 66 Q. After you left St. Louis on June 19th, 1882, on your way back, at Denver on June 22d, you wrote Bowman the letter of June 22d, in evidence?

A. Yes, sir.

X 67 Q. And addressed that to the city of St. Louis?

A. Yes, sir.

X 68 Q. Your answer to that was received by telegram of July 13th, 1882, from some place in Wisconsin?

A. Ashland, Wisconsin.

X 69 Q. The next answer to it was Bowman's letter of July 16th, 1882, referring to it?

A. Yes, sir.

X 70 Q. Did you at any time between June 19th, 1882, and July 13th, 1882, receive any communication from Bowman, either telegram or written, relating to any other matter had between June 19th and July 13th?

A. I cannot recollect any, but I must have received one, because I addressed my letter of July 5th to him at Merchants' hotel, St. Paul, Minnesota. I must have received some intimation of that change of address in some way or other.

X 71 Q. Well, where is that letter or telegram?

A. I haven't found it. I do not know where it is.

X 72 Q. Will you swear there was one?

A. No; I will not. I say there must have been one, or I should not have written to St. Paul, Minnesota, instead of Bayfield, Wisconsin.

X 73 Q. Is it not a fact that you did write to St. Paul, Minnesota, at that time, prior to July 13th, 1882, and in which you sent that draft for collection, because you knew he would not be there at that time and would not get the letter?

A. No, sir; it is not.

X 74 Q. And whatever letter you did write there, didn't it come back to you?

A. No, sir; I do not remember to have ever seen it. I am positive I have not. The draft came back.

X 75 Q. You had directed that no protest be made upon
557 the draft, didn't you?

A. Yes; I think I did.

X 76 Q. Why was that?

A. The other draft I sent Bowman for $465.00, I had to pay protest fee of $3.95 or something like that.

X 77 Q. Then you knew that this draft would not be paid?

A. I did not think it would be; no, sir.

X 78 Q. That is why you didn't want any protest made?

A. I didn't want any protest fee.

X 79 Q. How could you account for Bowman's refusal to pay if you really sent him the letter of July 5th, as you sau by your copy in evidence you stated—how could you count on Bowman's refusal on that information to come up and pay? Why would you know beforehand that he would not pay the draft, and direct the bank not to protest that draft?

A. How did I know? I didn't say that we were in a body of mineral in that letter; I said that the shaft, that the indications were very favorable, and I wrote that he would pay, so that I could go along peaceably, in that letter.

X 80 Q. Didn't you say in the copy of the letter that you have put in record that the porphyry was heavy iron-stained, and that you had good reason to believe you were near a good ore body?

A. Yes, sir.

X 81 Q. Now, why would you, if you had really written a letter containing that, conclude before he did get it, conclude that he would not pay, and direct the draft to be returned without protest?

A. As I stated before, I put that "no protest" there to save myself protest fees.

X 82 Q. Didn't you believe at the time that the draft would not be paid?

A. I did not think it would because Mr. Bowman had expressed himself, when I was in St. Louis on June 19th, as being dissatisfied in the way the work was going on, and he wanted to do a little work every ten days, and I wrote him in that letter I had
558 consulted with Col. Bissell and it would not be a fulfillment of that contract.

X 83 Q. But in June 19th, 1882, there was no intimation that there was any mineral as you gave in July 5th?

A. No.

X 84 Q. Now that you did know it on July 5th and say that you put it in the letter to him, why would you conclude or believe that he, with the information in his possession, he would not come forward and pay?

Objected to for the reason that it is calling for the reasons of the witness as to what would, in his estimation, operate upon the mind of a man who was fifteen hundred miles from him and also upon the mind of a man who had let drafts — returned before that and had grudgingly paid whatever he had paid in the performance of this contract and permitted his partner to bear the burden of the contract up to this time.

X 85 Q. I will show you now a letter of July 5th, 1882, dated Leadville, July 5th, 1882, addressed Dear brother and signed by yourself, the letter which was put in evidence already by the plaintiff in this case, being his Exhibit No. 4, and ask you if that is your writing.

A. Yes, sir; that is my writing.

X 86 Q. In that letter you say: "The shaft in the Col. Sellers is looking very promising: for several feet the porphyry has been heavy iron-stained and I have good reasons for thinking that we are near the contact. Acting on Col. Bissell's advice, I to-day write to Bowman telling him that if he did not pay up, I would apply to the owners of the ground for a new contract in my own name and leave him out. I don't suppose he will pay, but I will let you in on the new one on the same terms you are in the old." Why did you write to your brother stating that you didn't suppose Bowman
559 would pay, if you had written to Bowman giving him the information that you say you did in your so-called letter of July 5th?

A. Because he had paid so reluctantly on June 19th that I didn't think he would pay.

X 87 Q. One June 19th you hadn't any such information as this to give him?

A. No, sir; but I gave it to him on July 5th.

X 88 Q. Then why did you suppose that if he got this encouraging information in regard to the mine that he would refuse to pay?

Objected to for the reason that the answer called for does not go to prove any issue in the case, because it is not calling for the statement of any fact, and because the question as to whether he thought Bowman would pay or not is totally immaterial and irrelevant to the issues in this case.

X 89 Q. Was not it your intention at this time to get—now that you knew or believed that you were near the ore body—to get Bowman out? And were you not then engaged in manufacturing letters which you could afterwards show and claim that you had sent him if he should find out that he had been defrauded and sue you?

A. No, sir; I wrote just exactly what I put down there.

X 90 Q. Did you not in your telegram to Bowman of July 15th, 1882, telegraph to Bowman among other things: "See my letter of July 5th"?

A. Yes; I did.

X 91 Q. To where was that telegram directed?

A. That telegram was directed to Ashland, Wisconsin, and also a copy of it was sent to St. Louis.

X 92 Q. You knew, then, by receipt of his telegram dated the 13th of July that he was in Wisconsin?

A. I supposed he was; yes, sir.

X 93 Q. Why didn't you, if you wanted him to get hold of any letter of that kind, say in your telegram of July 15th, "See
560 my letter of July 5th, addressed to you at St. Paul"?

A. I supposed he had gotten it, because only a few days afterwards I received a letter from Bowman written from St. Paul.

X 94 Q. That was from July 16th?

A. Yes.

X 95 Q. You received a letter written by Bowman July 16th, 1882, at St. Paul, in which no reference is made to this letter of July 5th, didn't you?

A. Yes.

X 96 Q. Does not he state in that letter of July 16th, 1882, that from your subsequent letters he says that you still wish him to let go his interest on surrender of the notes?

A. The letter does state that.

X 97 Q. Now, in your pretended letter of July 5th, 1882, is not there a clause that you withdrew that offer?

A. Yes; there is.

X 98 Q. Now, how could Bowman on July 16th, 1882, if there had been any such letter as July 5th addressed to him at St. Paul, make any such reply as that?

Objected to because the answer called for is not the statement of any fact, is simply argumentative, and asks for the witness to state how the plaintiff, who was at St. Paul or Wisconsin, could have done certain things if certain other things were done, and for the further reason that if he did that it appears in testimony the plaintiff may have entirely ignored the withdrawal of the proposition contained in the letter of July 5th referred to and the subsequent telegrams of July 15th and insisted upon accepting the previous proposition of June 22nd.

A. I presume he just simply ignored that.

(By Mr. PARSONS:) I object to the witness stating what he presumed if he knows anything about it.

(Mr. MCGINNIS continues:)

X 99 Q. Then when you received that letter written by
561 Bowman July 15th, 1882, in which you would see from its tenor that he hadn't received your letter of July 5th, 1882, then why didn't you repeat to him the information in your so-called copy of July 5th, about your near approach to the mineral, so that he would be fully informed?

A. I thought that Mr. Bowman had received my letter of July 5th and had simply ignored it, and that it was still his desire to have that note returned to him and to get out of the contract; that he was unwilling to go ahead in the manner that I wanted to, and that he wanted to get out and to be relieved from any further liability in the case in the matter.

X 100 Q. Then, if you thought anything of that kind, why did you in your telegram of July 15th say: "See my letter of July 5th"?

A. I wanted to call his attention to the matter that I had withdrawn that offer.

X 101 Q. Why didn't you tell him where the letter of July 5th was?

A. He knew.

X 102 Q. But you testified that he told you in St. Louis that his address would be Bayfield, Wisconsin.

A. Yes, sir.

X 103 Q. Why didn't you address it there?

A. Because I must have had some information in the meantime telling me where his address was.

X 104 Q. Why can't you produce that letter giving this information?

A. Because I haven't been able to find it.

X 105 Q. This copy of the so-called letter of July 5th, 1882, is that the letter-press copy of it or copied in your handwriting on other paper?

A. No; I had no letter press at that time, and that letter I copied and kept in that way on the advice of Col. Bissell; he told me to take a copy of that letter when I wrote it.

X 106 Q. Did you show it to Col. Bissell?

A. I am not positive; I think very likely I did; I think
562 very likely he dictated a portion of it.

X 107 Q. Portions of it?

A. He told me in a general way what to put in there.

X 108 Q. That is, he dictated portions of it?

A. That is, he advised me what to write.

X 109 Q. Why is it that you hav'n't copies of your other letters?

A. Because I copied this on the express advice of Col. Bissell's. It was my intention at that time if that draft was not paid promptly to apply to the owners of the Col. Sellers and Accident claims and get a new contract from them, leaving Bowman entirely out. Mr. Bowman hadn't paid his proportion of the expenses and I was tired of carrying him.

X 110 Q. You gave that so-called copy of that letter of July 5th, 1882, to your attorney, Mr. Parsons, for use in St. Louis for the cross-examination of Mr. Bowman, did you not?

A. I gave it to him with the other papers I found; yes, sir.

X 111 Q. Did you also give to him a copy of that so-called statement referred to in the letter of July 5th, which you have since put in evidence here?

A. Yes, sir; he had it.

X 112 Q. Can you tell why he didn't use it at that time if he had it?

A. No, sir.

X 113 Q. Now, in this copy of the statement which comes to light for the first time in this case yesterday I note the following from the beginning:

"May 22.	J. A. Byrne	$25 00
24.	Engine	100 00
May 25.	"	85 75
May 27.	"	200 00
May 29.	" Carlin	20 00
May 30.	Express wagon	9 00
June 4.	Leadville Transfer Co.	55 00
June 9.	J. Carlin, tank	10 00
563 June 9.	Dennis and Coble, gallows frame	75 00"

Those are all payments that you state you made prior to your leaving for St. Louis, when you made your settlement of June 19th?

A. Yes, sir.

X 114 Q. Now, if that be true, I ask you why, in this pretended copy of the letter of July 5th, 1882, you use the following language: "Mr. Frank J. Bowman, Merchants' hotel, St. Paul. Dear Sir: I send you statement of all amounts paid on the Col. Sellers contract since our settlement, from which you will see that the amount due from you is $752.32." Now, I ask you how could you in so short a time after June 19th, 1882, put that statement in there that these payments were made since your settlement, if you had ever sent to Mr. Bowman at any time the paper like the one you introduced here in evidence as this statement.

A. Mr. Bowman knew of a good many of these items on June 19th.

X 115 Q. But your language is: "I send you statement of all amounts in the Col. Sellers contract paid since our settlement." Why do you use that language?

A. That language he could understand, because he knew that these items had been paid before June 19th.

X 116 Q. But your settlement was on June 19th, 1882?

A. Yes.

X 117 Q. And you state here in your own language since June 19th, 1882?

A. That language means that these were the items not included within that settlement.

X 118 Q. Is it not a fact that at the time your attorney appeared with this letter, but did not appear with this statement in St. Louis in the cross-examination of Mr. Bowman, your sworn answer in this case on file, stating that all amounts had been settled for down to June 19th, 1882, and hav'n't you since that time amended your answer and put in these other things, and does not this statement make its appearance for the first time?

A. No, sir; that statement I found in my house among
564 my papers. I found that statement last fall when I was looking over my papers and picked up things that had reference to this suit. I found those two papers together.

X 119 Q. Is not the matters contained in this statement prior to June 19th, 1882, purporting to have been payments made by you, a copy of the statement on which you settled this with Livezey?

A. Yes; they are both the same.

X 120 Q. But is not the difference between the one that you now produce and the one to Livezey contained in this fact, that Livezey's is correct because he had only paid $184.30, whereas Bowman had settled up to June 19th, 1882, and are you not now using a copy of the Livezey statement in order to back up your chain of settlement in your amended sworn answer in this case?

A. No, sir; that is the original statement that I made out. You can see there are quite a number of erasures there, and there are mistakes in the addition also.

X 121 Q. It is all in your handwriting, is it not?

A. I think so; yes.

X 122 Q. And it was first shown to the parties on the plaintiff's side of the case on yesterday?

A. I do not know when they first saw it. It is all in my handwriting; that is the original statement, and from that I made copies and gave to Livezey and also sent one to Bowman. I corrected the mistakes as they occurred in there, a mistake in addition, and forwarded it.

X 123 Q. When did you first discover any streak of ore of whatever nature in the Col. Sellers shaft?

A. We discovered ore on the 13th or 14th of August, 1882.

X 124 Q. Don't you know that after July 5th, 1882, when this letter you wrote to your brother, you stated that you thought you were near the contact and the porphyry was heavily stained with iron, and don't you know that after that date, the 5th of July, 1882, and in July that several streaks of ore were cut in the
565 Col. Sellers shaft, and that an assay was made from one of these streaks and it run nineteen ounces to the ton in silver?

A. No, sir; I do not.

X 125 Q. Do you swear that it was not the fact?

A. I swear that there was no ore in there.

X 126 Q. I am asking now about the streaks of ore.

A. Yes; there were no streaks of ore until we struck this first streak on or about the 13th or 14th of August, 1882.

X 127 Q. Don't you know that in the Leadville Herald of this city there was published on July 30th, 1882, the following: "The Col. Sellers shaft, on Iron hill, is now down about 215 feet. Some small streaks of ore have already been cut, one of them assaying nineteen ounces in silver. The sinking of the shaft is progressing rapidly, with the prospects that expected ore bodies will soon be cut"? Leadville, Sunday, July 30th, 1882.

Counsel for defendants objects to the question because, 1st, counsel for the plaintiff is reading from notes of his own making and not from a newspaper; 2d, that newspaper statements in regard to mining developments are not competent evidence in this case, and, 3d, because it appears by the question itself that the mineral, if any was struck at all, was struck at a depth of 215 feet in the Col. Sellers shaft, and that the fact sought to be proved by the question and answer called for is susceptible of being proved by the examination of the shaft to that point, which would be the highest and best evidence of the fact called for, and, further, that the witness is not responsible for any statements of newspapers, unless it is shown that he caused said notice to be published or unless he had something to do with it.

A. I do not know about that. I do know, however, that
566 such things are frequently published in newspapers when there is no foundation for them.

X 128 Q. Were not you in Leadville on July 30th, 1882?

A. I think I was; yes.

X 129 Q. Will you swear that you didn't see that—you didn't see that in the paper?

A. No, sir; I will not swear. I will not swear that I didn't see it at all.

X 130 Q. If you saw it why didn't you cut it out and send it to Mr. Bowman?

Counsel for defendants objects to the question for the reason that it does not appear that the statements of the newspapers were true, and, further, that the defendant was under no obligation to send a published item of that account to the plaintiff; that the answer called for has no relevancy to the matter in issue, and it is incompetent and immaterial.

X 131 Q. There were others interested at the same time with you—Mr. Stebbins, Robison, who lived here—in that property?

A. Yes; there was Mr. Whiting. What is the date of that?

X 131½ Q. July 30th, 1882.

A. I do not remember whether Mr. Whiting had bought in or not, but Stebbins and Robison and Livezey were here most of the time. I could not swear that they were here at that particular date.

X 132 Q. You will not swear that you didn't receive that information in that way that day if you didn't have it from other sources?

Objected to as totally irrelevant and incompetent.

A. I will swear that I do not remember anything at all about that.

X 133 Q. You stated in your letter to your brother of July 5th, 1882, that the porphyry was heavily iron-stained and you had good reasons for believing you were near the contact?

A. Yes; I stated substantially the same thing in my letter
567 to Bowman of July 5th, 1882.

X 134 Q. That is the letter that Mr. Bowman says that never reached him?

(Mr. PARSONS:) Don't answer that. That is not a question. It is a statement.

X 135 Q. When did you first come across this little streak of silver or any ore of any grade at any place in the shaft in the Col. Seller's?

A. The first that I remember of—the first that we got, in fact—was, as I stated, along about the 13th or 14th of August, because we were anxious to get those streaks, because we wanted something to show against these jumpers, and we hurried it as much as possible in order to get it.

X 136 Q. You say that in your——

A. And on the 30th of July, if that is the date of that, I supposed that Bowman was entirely out of the contract. I had accepted his letter of July 16th.

X 137 Q. Is that your reason for not sending that clipping to him?

A. That is not my reason. I do not remember to have seen that at all.

(Mr. PARSONS:) It does not appear in evidence that he ever saw or knew of that clipping in the newspaper.

X 138 Q. In your letter or in your answer to Bowman's letter of July 16th, 1882, did you send a letter accompanying the draft of contract that you state you sent?

A. I think very probably I did. I am not positive, as I stated in my direct examination, that I did or not. I signed the contract that I sent to him for signature; that I thought sufficient. I am not positive.

X 139 Q. If you sent such a letter did you state in it the developments up to that date?

A. I could not say.

X 140 Q. Could you say whether you did or not?

A. I say I do not know whether I did or not. I do not re-
568 member of sending any such letter.

X 141 Q. You recognized it to be your duty as a partner, when you wrote a letter accepting what you call Bowman's proposition of July 16th, 1882, to tell him concerning what occurred before you wrote that letter, didn't you?

Question objected to because it — asking the witness to state a question of law or answer a question of law and not calling for any statement of a fact.

X 142 Q. You recognized it to be your duty as a partner, when you wrote a letter accepting what you call Bowman's proposition of July 16th, 1882, to tell him what occurred before you wrote that letter, didn't you?

A. I did not regard him as my partner after I received that letter of July 16th; he had not paid.

X 143 Q. Didn't you regard him as your partner up to the time that you mailed an answer to that letter?

A. Yes; but I accepted his proposition and I thought that ended the partnership.

X 144 Q. In your view when did your partnership with Bowman end, when you received his letter of July 16th, 1882, or when you mailed your answer to it?

A. Take the two together.

X 145 Q. It can't be both. When did you conclude that Bowman was not your partner and was not entitled to the information?

A. When I accepted his proposition of July 16th.

X 146 Q. Don't you know that you didn't mail that proposition of yours which you call a draft of contract signed by yourself until after the 1st of August?

A. No; as I stated in my direct examination, I could not fix the date, but that I was satisfied, very sure, it was before the 8th of August.

X 147 Q. Why didn't you send a letter with that copy of contract or draft of contract?

A. I may have done so.

X 148 Q. Then if you did, did you state anything of the
569 discovery and indications of ore up to that date?

Objected to because the question assumes that there had been a discovery of ore at the time that the witness mailed the draft of contract to the plaintiff at Bayfield, Wisconsin, which fact has not been proved.

X 149 Q. If you mailed a contract—a copy of the contract—to Bowman before the 8th of August how do you account for his now getting it until the 20th of August?

Question objected to because the fact called for is not presumably within the knowledge of the witness and because he is not compelled to account for the failure of the plaintiff to get his mail in due course of mail.

X 150 Q. If you wrote it prior to the 8th of August why did you wait until September 2d, 1882, while you were in the city of St. Louis, to write again to Bowman asking him if he had signed it?

A. Because I wanted to get the contract and get the thing fixed up in shape. I wanted his signature to the contract.

X 151 Q. Now, then, if you sent it prior to August 8th, you would naturally expect an answer anyhow by the 15th of August, would not you?

A. Not up there; hardly.

X 152 Q. You would expect one by the 20th of August, would not you?

A. I could not say whether he would get that letter and he had—he may have delayed in answering the letter and may have delayed before getting it, and he says himself, in his postscript of August 8th, the mails are slow there.

X 153 Q. If you had written prior to August 8th you would naturally have expected an answer, after several days' delay, after August 20th?

A. I could not say when I would expect it.

X 154 Q. You did not leave Leadville until August 30th?

A. No, sir.

X 155 Q. But you didn't even at that time write whether
570 he had got it or not?

A. I am not positive whether I did or not.

X 156 Q. Don't you know that you wrote — September 2d, 1882, from St. Louis, which the plaintiff has here in evidence in this case, in which you state, "I sent you from Leadville an agreement concerning the Col. Sellers"?

A. Yes; I am rather under the impression when I left here that I would meet Bowman in St. Louis about that time.

X 157 Q. How could you be under that impression when you knew that he would be gone all summer?

A. He told me in June that he would stay some time in September.

X 158 Q. You got your last letter from him prior to July 16th, didn't you?

A. Yes; the last I have been able to find.

X 159 Q. That you got from him?

A. I got; yes.

X 160 Q. In that letter of September 2d, 1882, when you supposed by the tenor of the letter that he hadn't yet signed the contract, you stated to him that the shaft on the Col. Sellers was still going down?

A. Yes, sir.

X 161 Q. Why didn't you state to him then that ore had been discovered in quantity, in a body, long prior to that?

A. As I said in my examination, direct examination, I hadn't seen that body of ore; I only had that from hearsay.

X 162 Q. But you believed that it existed, did you not?

A. Yes, sir.

X 163 Q. You were confident of its value?

A. No, sir; nobody could be. Nobody could be confident of its value at that time, because we had only gone into it a few inches and were drowned out by water on the 30th of August, when we went up there.

X 164 Q. Why didn't you state, then, in your letter of September 2d, if you took the trouble at all—why didn't you mention the fact that the shaft had gone down some inches in a body of mineral instead of saying still going down; why didn't you state it in that way, as you were on that subject?

571 A. Because I regarded Bowman as entirely out of the thing, as I had accepted his proposition of July 16th.

X 165 Q. You did not know at that time that he had accepted your proposition and signed the papers; why did you mislead him in that way and not tell him?

A. I did not think it was necessary for him to accept it; I had accepted his proposition to me.

X 166 Q. Why didn't you keep silent about the shaft or tell the truth about it?

A. I did tell the truth about it.

X 167 Q. Is that your idea of the truth, to say that the shaft is going down when the shaft was in mineral; is that your idea of the truth in that matter?

Objected to as being incompetent and irrelevant.

A. I refuse to answer that question.

(Mr. PARSONS:)

X 168 Q. Answer the question.

A. As I stated before, I accepted Bowman's proposition as he put it to me on the 16th of July, and I had this paper prepared as he suggested I should in that letter. I had signed the paper myself, and I thought that, even without Bowman's signature, was a full dissolution of any partnership that might have existed between us.

X 169 Q. Don't you know that it is a fact that if you had sent Bow-

man your telegram of July 13th, announcing the fact that all propositions were withdrawn by you, that no ore had been discovered or even streaks of ore up to July and the date you received his letter of July 16th, 1882, and that you didn't immediately after the receipt of that letter, which would be about July 20th, 1882, in due course of mail, have this contract prepared and sent on to him in the latter part of July and you waited, went along until mineral had been discovered in both the streaks of ore and afterwards the body of ore, and that in the latter part of August, say after
572 the 15th of August, you sent on that contract, and when you sent the contract you didn't send any letter because you didn't want to make any statement to commit yourself in regard to the discovery?

A. No, sir; I do not know that such was the fact.

X 170 Q. And then didn't you afterwards, after you waited a reasonable time for Bowman to get that letter and reply to it, didn't you, in order to hurry him up and throw him off his guard, induce him to sign the paper; state in your letter of September 2d, 1882, that the shaft was still going down; carefully avoid mention of mineral?

A. No, sir.

X 171 Q. Now, you have stated in your examination-in-chief that the shaft had got into a body of mineral after having passed through other portions of low-grade mineral, on August 30th, 1882, and that evening you left for the East.

A. Yes; I stated that the foreman had so informed me.

X 172 Q. Then you stated that the water came in the shaft on that ore, and that there was no further opening up of that body of ore until when?

A. Well, I said in my examination that the first thing my partners did after I left here was to try to handle that water with a large bucket, and they didn't succeed in getting the water out that way, and then they put in a steam pump, and the steam pump was too small to handle the water, and afterwards they tried this steam head and Cornish pump, but they could not handle it with them—that is, they could not do any good—and then we decided to put in this large Cornish pump plant.

X 173 Q. When did you put them in?

A. It was put in after I returned from the East.

X 174 Q. About what time was it put in?

A. I think the work was commenced perhaps in January, 1883.

X 175 Q. Up to that time you hadn't opened up the body of mineral any further; you were fighting water, were you?

573 A. Yes; we got down a foot or two.

X 176 Q. About what time did you run down that foot or two more, after you came back or before?

A. I think that was done after I came back, after they put this—no; it was done before I came back; it was while they had this steam head on.

X 177 Q. About what time?

A. Some time in October.

X 178 Q. And when you came back they only got a little further?

A. Yes.

X 179 Q. And they had to get pumps to get it (water) up?

A. Yes, sir.

X 180 Q. The water was in it when you got back—the ore was covered?

A. Yes.

X 181 Q. You didn't see it?

A. No, sir.

X 182 Q. Therefore your opinion that you had in October, 1882, after you returned to Leadville, of the value of that property and character of it, was derived from what you had seen and heard prior to that time, *and* was not it?

A. Yes; it was derived more from hearsay than anything else. I had seen but little ore on top that they had hoisted, some eight or ten buckets full, perhaps.

X 183 Q. Don't you know that on the 29th of October, 1882, in the letter that you wrote from Leadville to your brother James, which has been offered in evidence by the plaintiff in this case, that you stated to him that you had refused since you came back to Leadville and prior to October 29th—that you had refused $2,000.00 for one-sixteenth interest in that mine? What do you say about that?

A. I do not remember that letter. I know that within a few days after October 29th I did accept $3,000.00 for a one-sixteenth.

X 184 Q. Of whom?

A. I sold it to John J. Simmons, of Chicago.

X 185 Q. That was a private deal between the owners of
574 the mine, was not it? He was already a part owner in the mine, was not he?

A. I do not think his interest appeared of record, but I think he was interested in what appeared in Samuel J. Glover's name.

X 186 Q. Was not that an agreement that you had made some time before that you were then carrying out?

A. No, sir; I think not; the negotiations for that sale were made through the brother of John J. Simmons—John N. Simmons.

X 187 Q. Don't you know that on October 29th, 1882, that you believed that within a year, judging from what you knew and heard of the mine previous to that and leaving out of the question the difficulties of the water, that the Patricks could on their interest in that mine take out $80,000 a year?

Question objected to for the reason that it assumes that the statements of the letter of October 29th, 1882, which has been introduced by plaintiff in evidence, states that the Patricks could take out $80,000 worth of ore within a year, whereas the letter itself shows that he made no such statement, and for the further reason that the statement contained in said letter is the mere expression of an opinion, relating entirely to the future developments of the mine, and for the further reason that the letter purports to have been written

after the negotiations between the plaintiff and defendant were ended.

A. I can answer that question better after reading the letter. (Plaintiff's counsel hands witness letter.) Yes, barring all the contingencies that I mentioned in that letter, it was my opinion from what I heard that we might take out $8,000.00 or $80,000 in a year from that date.

X 188 Q. Now, I will ask you the question. In your examination-in-chief, just before you closed, you stated in general
575 terms that the ore was of a low grade and of no value — that is, that that was your opinion after you returned from St. Louis after October 19th, 1882; that the mine was of no value; that the ore was of low grade; that they could not be handled; the smelters would not take it; did not know how to treat it; it was valueless comparatively. I will ask you how you can reconcile your statements then made with the statement I now read you from your letter of October 29th, 1882, from you to your brother James, which letter I have just shown you. In that letter you say: "Your telegram was received this morning. I am not quite sure that I understand, but think you want to know if it would be safe to bet that I will get $8,000.00 out of the Sellers and Accident in one year. I think it best to answer by mail so I can explain things. At present the Sellers is shut down as there is more water than we are able to handle, but we are looking around for a pump and hope to get one that will answer our purpose here. We have a bid from Fraser and Chalmers of Chicago for a plant for a 10″ Cornish pump f. o. b. at Chicago for $7,000 and in addition to that the cost of freight and putting the machinery in place would be $7,000 or $8,000 more, making total cost $15,000.00 I think however that we can get what machinery we will need for the present right here at a cost of say $5,000 that will answer our purpose till we can get down and see what we have. In case we can get the pump working soon, I don't think there is any question but that we can take $8,000.00 or $80,000 either out within a year. The stuf- that was taken out of the shaft after I left here is in the ore-house and looks well." I will ask you how you can reconcile the statement contained in that letter with what you testified to this morning.

Objected to for the reason that it assumes that the witness stated that the ore found in the Col. Sellers shaft after the witness's
576 return from St. Louis in October, 1882, was of low grade, was worthless; that the smelters would not buy it and gave no value to the mine, whereas the witness stated that the ore discovered on the 13th or 14th of August, 1882, in the little seam which was found in the porphyry was of no value and that it would not pay the cost of treatment and that it gave no particular value to the mine, and for the further reason that the witness stated that he hadn't seen the ore in the bottom of the Col. Sellers shaft at the time that he made the negotiations with the plaintiff for the purchase of his interest in the claim or at the time that he received a deed for the plaintiff's interest.

A. I was going to answer the question substantially as it has been put in the objection to it; that I think Mr. McGinnis is mistaken in regard to my testimony-in-chief—that is, that I testified particularly in regard to this little streak, and I was simply expressing an opinion in that letter, which opinion was afterwards confirmed in the first shipments of ore we made. We made the first shipment of ore in March, 1883, and that shipment was really low-grade ore, and I think we realized from the smelter a little over $5.00 or $5.67 per ton for it.

X 189 Q. Is it not a fact that when you were in St. Louis on October 19th, 1882, that you did not go near Bowman, but kept away and sent forward your brother James precisely as you did in the transaction detailed in your letter of December 23rd, 1881, in the other attempt to get some money out of Bowman?

Counsel for defendants objects to so much of the question as relates to the letter of December 23d, 1881, stated by counsel for the plaintiff as to his attempt to get money out of Bowman, and moves to strike the same out as irrelevant and incompetent and not calling for the statement of any fact relative to the issues in this case.

577 A. No, sir; it is not a fact.

X 190 Q. You stated in your examination-in-chief this morning that the question of your assuming Bowman's obligations to your brother James under that contract of March 25th, 1882, was discussed prior to Bowman making his deed, and that in your presence there was written out a request dated October 19th, 1882, by James to Bowman to transfer the whole interest standing in Bowman to you, and that you would deed to him his interest?

A. Yes; that is my recollection.

X 191 Q. Now, if that matter was discussed on October 19th, 1882, and that paper was written as it was on that date, as it shows, if you were present, why is it that your endorsement or assumption of Bowman's obligation to James M. Patrick under that contract of March 25th, 1882, written on the back of that contract, was not written and signed by you until October 21st?

A. Well, because Mr. Bowman would not acknowledge the deed until October 20th.

X 192 Q. Why not write it, then, October 20th?

A. I do not know. I do not remember how that was. I presume I saw him. That matter was discussed on the 19th and we agreed to it, and the deed was not delivered until the 20th, and this obligation on my part was entered into the next day.

X 193 Q. Why would it be entered into after if you were all there together and this matter was brought up on the 19th of October? Why was your assumption of that made the day after the delivery of the deed?

A. I do not remember how that was, but of course I would not assume that until after the deed had been delivered.

X 194 Q. Don't you know that you kept in the background, and that James Patrick came to you afterwards and got you to sign that and you signed it October 21st?

A. No, sir.

X 195 Q. And that he took it back and showed it to Bow-
578 man?

A. No, sir; I do not know it. My recollection is quite distinct that we went to Bowman together.

X 196 Q. Now, you have stated in your examination-in-chief this morning that you were present, you and James, in Bowman's office on October 19th and 20th, 1882, and that Bowman did not ask you anything about the discovery of ore or the condition of things in regard to the shaft. When did you mention it to him? That was about what you said, was not it?

A. Yes; that is about it.

X 197 Q. Now, if you wrote to Bowman that pretended letter of July 5th, 1882, in which you say you mentioned to him that you were near the ore contact, things looked promising, and he received any such letter, how could you account for him not asking you something about the developments as late as October 19th, 1882?

A. Well, because he had made me a proposition, I had accepted it, I paid his note and delivered the note to him, and of course that ended the matter between us. I supposed he considered it so at the time.

X 198 Q. How can you explain that he would not out of mere curiosity, having been engaged with you as a partner up to within a short time of sinking that shaft, of not asking you what luck you had up to that date if he had received any such letter as the date of July 19th, 1882?

Objected to as a question of argument and does not ask for any statement of fact, and it is a question that would better be put to the plaintiff instead of the defendant, and the witness is not bound to know what would operate on the mind of Bowman, and for the further reason that the answer called for is immaterial for the reason that the contract had already been made between the plaintiff and defendant for the transfer of the plaintiff's interest to the
579 witness and had been partly performed.

Mr. McGinnis, plaintiff's counsel, states to the witness that the question is put to show the unreasonableness that he was present on that date, and that it is unreasonable or peculiar silence of both parties in regard to the matter.

Mr. Parsons, counsel for defendants, reiterates that it is a matter of argument and not a proper question to be put to the witness.

A. I can't state why he did not ask about it.

X 199 Q. Did you not in the month of August take measures of any kind to prevent any member of your *familar* from letting out the information of the discovery of ore in the Col. Sellers shaft so as to prevent it from getting to Bowman before you got his deed?

Question objected to for the reason that no time is stated, that the members of his family are not identified, are not named, and for aught that appears in the question the communication, if any such

was made, may be privileged; further, that no foundation has been laid for the question and answer called for.

A. I did to some extent; yes, sir; I felt that if Bowman, having only this letter of the 16th and his written promise that he would sign a certain paper—that if Bowman heard of the other ore, any strike in the Col. Sellers, or that the Col. Sellers was looking any better, that he would back out of any agreement he made *any agreement he made*, and I would have to sue him for specific performance in order to induce him to give the deed that he had agreed to do in our correspondence and also in this contract of August 28th.

X 200 Q. And you took these precautions to prevent that from getting out in August 28th, 1882, and no contract was signed by him to make you a deed until after that?

580 A. Yes; he had signed this letter of July 16th, 1882, which was almost identical with the contract which was afterwards signed and sent by me.

X 201 Q. But you hadn't answered that letter till a long time afterwards?

A. I didn't so state it.

X 202 Q. How did you state it?

A. I stated that I feel positive that I had answered that letter within a few days after its receipt, and that I was positive that I answered that letter, or rather that I afterward sent the contract which Bowman suggested in that letter prior to the 8th of August, 1882.

X 203 Q. Did you get Bowman's letter of July 16th, 1882, about the 20th of July, 1882?

A. Yes, sir; between the 20th and 21st.

X 204 Q. Why didn't you, then, say about the 25th of July, send that paper?

A. I could say that just as well, but I didn't say. I was not positive in regard to that date, except that I was positive that I had mailed that paper prior to August 8th.

X 205 Q. There was quite a discovery of ore on August 8th, was not there?

A. No, sir.

X 206 Q. Have you not been aware for several months past that the plaintiff is in possession of several letters written by members of your family, not including your wife'- nor other letters heretofore stricken out by the court in evidence in this case?

Question objected to because it is immaterial whether or not the witness knew that certain members of his family had written letters concerning the condition of the Col. Sellers mine, and if any such letters were written the defendant William F. Patrick is not bound by them.

A. No; I will say that I am not aware of any such letters. I know of reading from Bowman's testimony that he alludes

581 to some such letters.

X 207 Q. Is it not a fact that having read Mr. Bowman's

testimony and his allusion to such letters that you took steps in August, 1882, between the 1st and 15th, to prevent whatever knowledge any members of your family may have had of the strike in the Col. Sellers from getting to Bowman, as gathered from Bowman's letter?

A. No; as a matter of public talk and gossip in Leadville and what was in the paper at that time, there had been a strike of ore about the 13th of August, 1882.

X 208 Q. You had read these papers, had you?

A. Yes, sir.

X 209 Q. I will now ask you if you did not see the following in the Leadville Daily Herald of Thursday, August 10th, 1882: "Late Tuesday night—which would be August 8th, 1882—ore was encountered in the shaft of the Col. Sellers on Iron hill, appearing first in one corner of the shaft. The ore is pyrites in character and is pronounced to be identical with that which was first cut in the A. Y. mine, which it adjoins. It is probable that it will be necessary to pass through several feet of it before the same class of ore which has enabled the A. Y. to make such shipments will be reached. The property is owned by W. F. Patrick, Charles Stebbins, George Simmons, John Livezey, and others." Leadville Dailey Herald, August 10th, 1882. So you were aware at this times that these publications were made?

A. Not at that time, but later than that. I do not remember.

X 210 Q. You were in Leadville then, were not you?

A. I could not say positive whether I was in Leadville just at that time or not. It was in August, I think, the latter part of August, that Col. Bissell and I took this trip across the range to Gunnison county.

X 211 Q. Then does not this refresh your recollection that this ore was struck at this time in the Col. Sellers shaft?

A. No, sir. I did not know its character.

582 X 212 Q. Why didn't you, when you found this out, send a clipping of it to Bowman?

Objected to for the reason that the witness has not stated that the ore had been encountered on the 8th of August, 1882, and because counsel assumes that the statements contained in the Leadville Herald is true, and that the witness has stated that it is true, whereas the witness has denied any such statement.

A. Because I considered that Mr. Bowman was out of the partnership and I had accepted his proposition contained in his letter of July 16th and was going to pay the note when it became due.

X 213 Q. Now, is it a fact that you knew?

A. The fact of the matter is that I do not remember of ever having seen that, but I may have done so.

X 214 Q. Didn't you state just now that it was a matter of public notoriety?

A. Yes; at the time, but I did not know. It was but hearsay. I do not think the strike was made as early as that.

X 215 Q. Is it not a fact that you struck the ore in quantity that

passed in July through streaks that assayed nineteen ounces to the ton—in silver to the ton—was struck on the night of August 8th, that made you so solicitious to say in your answer that you sent the draft of contract to Bowman prior to August 8th?

Question objected to for the reason that the question assumes that there was a streak of ore in the Col. Sellers shaft in July, 1882, that assayed nineteen ounces to the ton, whereas there is no proof of any such fact.

(Mr. PARSONS:) I want to say to the witness that he can go on and give his reason.

583 A. I will state in the first place that I didn't make any statement that there was any such streak in July, 1882, as is indicated in the question, and that I feel confident that the strike so announced on the 8th of August, 1882, is not correct, and my reason for knowing that I mailed this contract prior to August 8th, 1882, was that in a letter which I recently found that I had written to my wife in August, 1882——

X 216 Q. What date?

A. August 21st, as I remember, I say words to this effect: "I have not yet received"—would there be any objection to reading from the letter?

(Mr. MCGINNIS:) I will make no objection to your reading the letter to your wife; you can answer it in any way you please and state it in any way you please.

A. This is the letter which I wrote her.

X 217 Q. What is the date of it?

A. August 21st, Leadville, Colorado, 1882.

X 218 Q. Read the letter.

A. Read it all or portions of it?

X 219 Q. Only the parts relating to the Sellers business matters.

A. I say to her: "I am going up to the Col. Sellers this afternoon to measure the shaft, and if it is as deep as they claim, meaning the contractors there, I will get my deed to-morrow morning. I suppose I will have to go to St. Louis to see Bowman and get it fixed with him as I have heard nothing from him since sending him the agreement you saw." That is all in regard to Bowman contained in that letter. That letter enables me to fix the date definitely as before the 8th of August, 1882.

X 220 Q. Why?

A. Because she left here on the evening of the 8th of August.

X 221 Q. Didn't you then on the same day that she left, on the 8th of August, after you knew of the discovery of ore,
584 write and sign and send that contract to Bowman?

A. No, sir; I am positive, as I stated before.

X 222 Q. Did Livezey and Stebbins tell you in July, 1882, of the fact that you passed, in sinking the Sellers shaft, you had passed through several streaks of ore; one of them had been assayed and run nineteen ounces of silver to the ton; did they not tell you that in July, 1882?

A. No, sir; I think not; I have no such recollection.

X 223 Q. Why do you say "I think not; I have no such recollection"?

A. Because I do not remember anything of that kind. Another reason is I do not know why they should tell me, because, as I remember, I was here most of the month of July; I was away a few days.

X 224 Q. What time in July were you away a few days?

A. The latter part of July, as I remember, with Col. Bissell, with him in Gunnison county.

X 225 Q. You got back when?

A. I cannot fix the date definitely.

X 226 Q. How long had you been back prior to your wife leaving, August 21st, 1882?

A. Well, that is my recollection, that I was there the latter part of July, so I must have been back several days; it might possibly have been in August I was over there; I think I have a memorandum which will fix that definitely, but I haven't them with me.

X 227 Q. That was written on the 21st of August?

A. Yes, sir.

X 228 Q. Did you not talk with Livezey and Stebbins and tell them what information you had got as to what you discovered in the shaft in July, 1882?

A. No; there was no discovery in the shaft in July, 1882.

X 229 Q. You state positively then that the statement which I have read to you from the Leadville Herald of July 30th, 1882, that several streaks of silver had been cut there and one of them assayed nineteen ounces is false, do you?

585

A. Yes, sir.

X 230 Q. That is false?

A. Yes, sir.

X 231 Q. Do you mean to say that it was not contained in the Leadville Herald of July 30th, 1882?

A. No, sir; I do not.

X 232 Q. Do you mean to say that the Leadville Herald does not contain the statement that I have read to you from the issue of July 30th, 1882?

A. No, I do not; that may be there; very likely it is; but I say that that statement made in there was not true at the time.

X 233 Q. I now state to you that I hav'n't a separate copy of that paper nor of the one of Thursday, August 10th, 1882, from which I have read you an extract, and will state to you that the only bound copy in Leadville I have been able to find — the back number which you know, do you not?

A. Yes.

X 234 Q. If you can see there for yourself and verify it before you come here to-morrow morning. Now, sir, didn't you yourself tell a reporter of that paper these facts?

A. No, sir; I did not.

X 235 Q. Didn't you state it to other people?

Objected to for the reason that the name of the reporter is not given, the time when the statement is assumed to have been made is not given, the place where it is made is not stated, and therefore no proper foundations has been laid for the question.

X 236 Q. Don't you know that Mr. A. F. Weunch was then the mining editor of that paper, and that these statements published in that paper came from you to him?

A. I know that he was the mining editor of that paper for a long time.

Objected to for the reason that the time and place is not stated in the question.

X 237 Q. It was stated by you to him in Leadville on the
586 day before each of these publications were made respectively?

A. No, sir.

X 238 Q. Will you swear that you did not?

A. Yes; I think I can.

X 239 Q. Are you positive about it?

A. Quite positive; yes.

X 240 Q. Did you write any letters to Bowman after your letter of June 22d, 1882, and prior to July 16th, 1882, except the one alleged letter of July 5th, 1882?

A. Yes; I found one in testimony that he had introduced June 28th, 1882.

X 241 Q. Didn't you write another one?

A. I do not remember any others.

X 242 Q. You stated that on your return from St. Louis, leaving there June 19th, 1882, that you immediately came through to Leadville to see Col. Bissell and asked him if he would take Bowman's interest.

A. Yes; I said I stayed in Denver one day.

X 243 Q. That was the 22d?

A. Yes.

X 244 Q. When did you see Col. Bissell?

A. I saw him the same day or the next day after I returned to Leadville.

X 245 Q. Don't you know that you claimed to Bowman as late as June 27th, 1882, that there was a party here in Leadville who would take his interest?

Objected to for the reason that the question does not state whether or not the claim was made by letter or otherwise.

A. Yes; I think in the letter of June 28th I mentioned it. I do not think I ever told Bowman positively that there was a party who would take it, but I thought there was a party who would take it.

X 246 Q. And you passed through Denver on the 22d and got here on June 23d or 24th and saw Col. Bissell and had an oppor-

tunity to see him. Why did you state positively in your let-
587 ter of June 28th, 1882, there was a party who would take it? What made you make that statement if Col. Bissell had refused and you hadn't seen him?

A. I do not know that I did state that positively on July 28th.

X 247 Q. Didn't you on June 27th, 1882?

A. I do not remember.

X 248 Q. I now show you a letter dated June 27th, 1882, addressed to Frank J. Bowman and ask you if that is your handwriting.

A. (Witness examines letter:) Yes; that is my handwriting.

X 249 Q. Don't you state in that letter——

A. That is the letter that I was referring to.

X 250 Q. I would also like to have an answer in regard to the proposition to him made in regard to the Col. Sellers: "Return your note and you forfeit your share in the contract; there is a party here who will take it. W. F. Patrick." Why did you state positive June 27th, 1882, that there is a party here who will take it if Col. Bissell refused to take it?

Objected to for the reason that the plaintiff and his counsel have been notified to procure all letters written by the witness to the plaintiff before this examination took place for the purpose of enabling the defendants to examine and inspect the same, which demand and notice have not been complied with, but, on the contrary, have been refused, and for the further reason that the question and answer called for by it are immaterial and irrelevant.

A. I can't say in regard to that; he may have told me at first that he would take it, and he may afterwards have changed his mind; I do not remember how that is.

X 251 Q. How did you make your payments to the various parties named on that alleged copy of statement which you
588 say you sent and the alleged copy of letter of July 5th, 1882, to Bowman?

A. I didn't say anything about an alleged copy. I said it was a true copy.

X 252 Q. How did you make your payments to the parties named in that statement?

A. I made it by check.

X 253 Q. On what bank?

A. On the Bank of Leadville.

X 254 Q. Have you your check book—your stubs?

A. I do not think I have all of them. I may have most of them at the house.

X 255 Q. Have you your cancelled checks?

A. I think so—yes. I hav'n't examined those. I have a great many old checks at the house.

X 256 Q. Qill you examine this evening and produce them tomorrow, on the continuation of your cross-examination, the stubs of the check book and the cancelled checks by which you paid the moneys to the parties named in your copy of that statement?

A. Yes; if I have them. I will see if I have them to-night.

Whereupon the taking of testimony was continued until ten o'clock, November 23d, 1887.

(By E. McGINNIS, Esq:) The time for defendants to take testimony is hereby extended five days from the date of the expiration of the time already given.

At the hour of ten o'clock a. m. November 23d, 1887, the taking of testimony was resumed.

WILLIAM F. PATRICK, cross-examination of, resumed by E. McGINNIS, Esq.:

X 257 Q. Have you the stub and check books and cancelled checks about which I questioned you yesterday afternoon?

A. Between what dates are those you asked the question about?

589 X 258 Q. Well, from the time you commenced making payments for expenditures incurred in regard to the Col. Sellers shaft down to September 7th, 1882?

A. Yes, sir.

X 259 Q. Have you both the cancelled checks and stub books?

A. Yes, sir.

X 260 Q. How long have you——

A. Also I have most of the receipts between those dates.

X 261 Q. How long have you known Jack Drummond?

A. I first became acquainted with Jack Drummond when I let him this contract on the Col. Sellers. I met him, I think, first in February, 1882, or probably the 1st of March.

X 262 Q. You did not know him before that?

A. No; that was the first time I ever met him.

X 263 Q. He is with you now or was with you?

A. Yes, sir.

X 264 Q. Where?

A. Down in San Juan county.

X 265 Q. Is he still in your employ?

A. He has not been in my employ for a year or more. He has been working for a mining company down there for which I was manager.

X 266 Q. After the Col. Sellers was taking out and shipping ore what relation had he to the mine?

A. He was superintendent.

X 267 Q. Between what dates?

A. The latter part of 1883 and the 1st of 1884; up to a little over a year ago.

X 268 Q. About what time?

A. About July or August, 1886.

X 267 Q. He was then discharged from the mine, was he?

A. Well, yes. You might say he was discharged; he resigned.

X 268 Q. Your connection with the mine ceased about the same time?

A. Yes, sir.

X 269 Q. Will you show me your checks for the payments on that hoisting engine to Skidmore?

A. Yes, sir.

X 270 Q. Let me see the cancelled checks, please.

590 A. I will say the first check, the first payment, of $100.00 I made him, as I find, in cash. I made that check to myself and gave him the money for it. I have his receipt for the $100.00.

X 271 Q. Give the dates and amounts.

A. May 25th this check went to George W. Chase.

X 272 Q. I will state now the object of these questions is to fix the dates and amounts and person to whom paid of the several payments. When was the first payment made to Skidmore, and how and where?

A. The first payment was made May 24th; I drew a check to myself or bearer; I drew the money on that and gave the cash to Skidmore; I have his receipt for that. The next is——

X 273 Q. Wait a moment; one at a time. Let me see that check and the receipt that relates to it.

(Hands receipt to Mr. McGinnis.)

(WITNESS:) Do you want me to read the receipt?

X 274 Q. Let me see it. I now ask you to produce receipt given by Skidmore and let the same be read and copied into the record; please read it.

A. Receipt for the first $100.00, do you mean?

X 275 Q. Yes.

A.—

"LEADVILLE, *May* 24, 1882.

"Received of W. F. Patrick one hundred dollars ($100.00) on account engine, hoister, tools, &c., from Henrietta claim, near Robinson, Summit Co. Balance, three hundred dollars, to be paid when machinery is at the depot in Leadville.

"S. V. SKIDMORE."

The receipt was introduced in evidence, is hereto attached, and marked Plaintiff's Exhibit "A" on cross-examination.

X 276 Q. When was the next payment made?

A. I believe the next payment in order is May 25th.

X 277 Q. Let me see that. (Witness hands paper to Mr. McGinnis.) Read that one.

A. This check reads:

591 "LEADVILLE, COLO., *May* 25, 1882.

"The bank of Leadville pay to Geo. W. Chase or order eighty-five .78 dollars. (Figures down below.)

"W. F. PATRICK."

X 278 Q. Read the endorsement.

A. The check is endorsed "Geo. W. Chase," and also "for deposit only, Ralph & Bergerman."

(Mr. McGinnis:) That check is offered as Plaintiff's Exhibit "B" on cross-examination.

X 279 Q. What is the next check in order?

A. What is the next item, Mr. McGinnis (Mr. McGinnis having statement)?

X 280 Q. It is the 27th of May, $200.00. Have you got that one?

A. Yes, sir. (Hands check to Mr. McGinnis.)

X 281 Q. Read that check, so that it goes in evidence.

A. Expense on hoister, so on May 27th I gave check for that, which reads: "Leadville, Colo., May 27, 1882. The Bank of Leadville pay to J. V. Skidmore or order two hundred dollars, $200.00 (in figures down below). W. F. Patrick." Check endorsed "J. V. Skidmore." Check is also marked paid, Bank of Leadville.

Said check was introduced, marked Plaintiff's Exhibit "C" on cross-examination.

X 282 Q. When you say payment for hoister or engine, is that one and the same?

A. Hoisting engine, hoister or engine; it is the same.

X 283 Q. When was the next payment you made on the engine?

A. I think the next is to Carlon, $20.00.

X 284 Q. Carlon, the 29th, $20.00?

A. The next one reads: "Leadville, Colo., May 29, 1882. The Bank of Leadville pay to J. C. Carlon or bearer twenty dollars." $20.00 in figures. "W. F. Patrick." That check was endorsed "J. C. Carlon."

Said check was introduced, marked Plaintiff's Exhibit "D" on cross-examination.

X 285 Q. When was the next check or next payment on the hoisting engine?

592 A. Will you please give me the date put down there? (Examines statement.)

X 286 Q. You have got in $125.00, $220.00; June 27th seems to be the last one.

A. The next payment on the steam hoister was June 27th; I paid that with check, which reads—I forgot to read the numbers of those checks; I suppose it is not material.

X 287 Q. It don't make any difference.

A. "Leadville, Colo., June 27, 1882. The Bank of Leadville pay to J. V. Skidmore or order twelve .50 dollars." $12.50 in figures. "W. F. Patrick."

X 288 Q. You say that was the balance?

A. That was the balance; yes, sir.

X 289 Q. That completed the payment of the hoister?

A. That was about it, I believe; I believe that makes $400.00.

Said check was offered in evidence and marked Plaintiff's Exhibit "E" on cross-examination.

(Answer continued.) That, I believe, makes $420.00; I gave Carlon $20.00 as commission; he acted as agent in purchasing this thing.

X 290 Q. I notice in that receipt of $100.00 given by Skidmore on May 22d, 1882—it says that the balance is to be paid when the engine is delivered in Leadville.

A. Yes.

X 291 Q. Who was to pay for bringing the engine to Leadville?

A. I think I was to pay that; I paid that to the transfer company—that is, I paid the freight bill; they paid the freight bill and I returned it to the Leadville Transfer Company, and at the same time paid them for taking the hoister to the mine.

X 292 Q. Was not the freight for sending that engine down to Leadville to be paid by Skidmore?

A. I think not; here is his bill of sale.

593 X 293 Q. Let me see that. (Examines.)

A. I was to pay the freight.

X 294 Q. Have you the bill of sale given by Skidmore to you for that engine, hoister, and boiler?

A. Yes, sir.

X 295 Q. With tank and fixtures complete?

A. Yes.

X 296 Q. Will you please read it to the stenographer?

A.—

"LEADVILLE, COL., *May 22nd*, 1882.

Know all men by these presents that I have this day sold to W. F. Patrick one engine, hoister, and boiler complete, with tank and fixtures, for the sum of four hundred dollars cash, the receipt of which is hereby acknowledged—$400.00. The above machinery is taken from the Henrietta mine of Kokomo.

J. V. SKIDMORE.
J. C. CARLON.

Witness:
JOS. F. FUMALTY."

Said bill of sale was offered in evidence and marked Plaintiff's Exhibit "F" on cross-examination.

X 297 Q. Did you not get back the $55.00 payable to the Leadville Transfer Company for bringing that engine and hoister from Kokomo and Robinson down to Leadville?

A. No, sir.

X 298 Q. On June 28th there is an item in that statement, extra work blowing up shaft, etc., $394.85. Where is the check for that?

A. Those three items close together there, Mr. McGinniss, are included in one check.

X 299 Q. Which three items?

A. The extra work blowing up shaft, etc., $394.85; water for engine, $45.50; fifty feet of second contract, $19.00 per foot, $807.50; also a portion of this other item, $77.20. I put it there. I can rase that. Those three items, then.

(Mr. PARSONS:)

X 300 Q. You can explain it.

A. I put Boetcher down there $144.00. In the first place, that included $66.80 that was due from Wood and Dunn that I deducted from the settlement of that date that I paid afterwards to Boetcher.

594 (Mr. MCGINNIS continues:)

X 301 Q. Now, where is your check for those payments? (Witness produces.) Let me see the check. Please read that check.

A.—

"LEADVILLE, COLO., *June* 28, 1882.

"The Bank of Leadville pay to T. H. Dunn or order nine hundred & eighty-one [5] dollars ($981.05 in figures).

"W. F. PATRICK."

The check was endorsed T. H. Dunn, and I guess that is identified by Campbell. I cannot make out exactly what it is.

X 302 Q. To whom was it paid and when?

A. To show exactly how that was reached I will have to show the receipts that I took at the same time. That shows the state of the account.

Said check was offered in evidence and marked Plaintiff's Exhibit "G" on cross-examination.

X 303 Q. Let me see the receipt. (Witness hands to Mr. McGinnis.) I now ask you to produce and read in evidence the receipt dated Leadville, June 28th, 1882, signed by T. H. Dunn, R. S. Wood, and J. D. Drummond, in connection with the check just offered?

A. That receipt reads as follows:

"LEADVILLE, *June* 28, 1882.

"Received of W. F. Patrick nine hundred and eighty-one — and five cents ($981.05) in full for all extra work on Col. Sellers and for fifty feet on second contract.

"Items as follows:

"Extra work	$394 85
"Water for engine	45 50
"Fifty feet at $19.00, less 15 %	807 50
They are three items added up, making	$1,247 85"
"Credit by cash	200 00
"Credit by amount due Boetcher	66 80
	$266 80"

is deducted from $1,247.85; leave a balance of $981.05.

It is signed by—

T. H. DUNN.
R. S. WOOD AND
J. D. DRUMMOND.

X 304 Q. What did T. H. Dunn have to do with sinking the first hundred feet on the Sellers shaft?

595 A. Well, I gave the contract to J. D. Drummond verbally some time in February—the latter part of February, I guess it was, of 1882. There was quite a delay in getting this contract of February 17th, 1882, back, and in the meantime he (Drummond) made arrangements with Wood and Dunn to go in with him on this contract, and they all three—no; Wood and Dunn did most of the work on the first contract. Drummond was away a good deal of the time running an engine, I think. I am not sure on what claim it was. It is a claim near the Matchless, through, so that is the way they got into the contract.

X 305 Q. When was that shaft blown up, under the first or second contract?

A. It was just about the time the first contract was finished.

X 306 Q. Before it was finished or after it was finished?

A. Just after it was finished; they might possibly have had a foot or two to go.

X 307 Q. Did not you write to Bowman in the letter that is already in evidence by him that the loss caused by blowing up the shaft fell on the contractor?

A. Yes, sir; I found out afterwards, though, that I was mistaken about it.

X 308 Q. Did you ever have a contract with Robison and Stebbins of indemnity to you against any delay and loss and damages caused by the so-called jumpers?

A. Yes, sir.

X 309 Q. Where is that contract?

A. I do not know where that contract is; I have not been able to find it; have not run across it yet.

X 310 Q. Where did you see it last?

A. I do not recollect where I saw it.

By Mr. PARSONS:

X 311 Q. Was that in writing?

A. My impression is that it was.

(Mr. MCGINNIS continues:)

X 312 Q. It is lost, then, is it?

A. As far as I know, it is.

596 X 313 Q. Did you search for it?

A. I didn't search particularly for it, although I looked over most of my papers last night for these checks and papers I have with me.

X 314 Q. What was the substance of that contract, as far as you can recollect?

A. As near as I can remember, I took that contract just shortly after the shaft was blown up, which must have been some time in May, 1882. The substance of that contract was that they were to indemnify me for any loss caused by the blowing up of the shaft. I think that was all.

X 315 Q. You and the other owners of the Col. Sellers were here in Leadville in the month of August, 1882, had a general settlement, didn't you, and commenced to work from that time as a company to work the mine?

A. Yes; we had an agreement on the 16th of August, I think it was, 1882. There had been some discussion among us, and this thing was to settle the whole matter. There was a general agreement, signed by all the owners of the Col. Sellers.

X 316 Q. And in that general settlement were you not allowed for this expense in blowing up that shaft according to that contract of indemnity?

(Mr. PARSONS:) You had better ask for the written contract itself.

(Mr. MCGINNIS:) We will ask for that.

(Mr. PARSONS:) We will object to that, because the original contract is the best evidence of the contents of the agreement.

(The last foregoing question was repeated.)

A. I think not in that agreement. My recollection about that is that Stebbins and Robinson gave me their note about the same time, in May or 1st of June.

X 317 Q. Of what year?

A. 1882, for the amount that we figured out was the amount
597 of damage so caused by the blowing up of the shaft—that is, the amount it took to put the shaft in the same condition as before blowing up.

X 318 Q. What was the amount of that note?

A. My recollection is that it was put down there $394.85.

X 319 Q. Was that note ever cancelled or paid?

A. Yes, sir; it was.

X 320 Q. When?

A. I do not think it was paid until 1883, some time.

X 321 Q. Have you that contract of settlement that was made August 16th, 1882, between you, Robison, Stebbins, and others?

A. Yes, sir.

X 322 Q. Will you produce it? (Witness produces contract). First, to whom was that note of $394.85 made payable?

A. That was made payable to me.

X 323 Q. To you individually?

A. I think so; yes.

X 324 Q. Is it not a fact that you sold one-eighth of your interest in that contract to John Livezey, Jr.?

A. No, sir.

X 325 Q. About his interest; was not some mention made in the papers there that Livezey's interest was standing in Bowman's name?

—. ——.

X 326 Q. Why was it that something was not said of it in some writing at that time?

A. I do not remember why it was not put in writing; it was talked over and agreed upon.

X 327 Q. Why was it that Bowman would be so careful to require James Patrick to put in writing or transfer his interest to you and not put in writing Livezey's interest to you?

Objected to because it is a matter of argument, does not call for a statement of fact, and it is asking the witness why the plaintiff did not do certain things, it not appearing that the witness had any control over the plaintiff in that matter.

A. I could not give Mr. Bowman's reasons for that; there
598 was a clause in the contract which I mailed to him and signed; also a clause in the contract of August 28th, which he mailed to me and signed, which bound me to relieve him against any further liabilities, and I presume that might be considered in the nature of a liability.

X 328 Q. Don't you know that there never was any communication between Livezey and Bowman regarding the purchase by Livezey of Bowman's interest?

A. I do not know whether there was or not.

X 329 Q. Don't you know that he never applied to Bowman to get his deed from him?

A. Yes, sir; he got his deed from me. I explained that on direct examination.

X 330 Q. Why is it that if Livezey bought a one-eighth interest from Bowman instead of an eighth interest from you that he never deals with Bowman and he is not mentioned in any way in writing between you and Bowman, and that he does not apply to Bowman for a deed, but gets one from you?

Objected to for the reason that the question is argumentative, and for the further reason that it does not appear that the plaintiff Bowman dealt with Mr. Livezey, and, further, because it does appear in evidence that the plaintiff assigned and transferred an undivided one-eighth interest in the contract which he and the witness obtained from the owners of the Col. Sellers and Accident mining claims to one William H. Wilson, and that said Wilson assigned the same to Livezey, and it further appearing in evidence that on the 19th of June, 1882, the plaintiff ratified and acquiesced in said assignment.

(The last foregoing question was repeated.)

A. The reason is that I told Bowman in St. Louis that I would make this deed to Livezey in accordance with his contract with Wilson of May 6th, and when I returned to Leadville I did so.

599 X 331 Q. Then why was there not made some provision in writing in regard to Livezey's interest, as there was in regard to James Patrick's interest?

A. I could not say why that was, Mr. McGinnis, except that I told Mr. Bowman at the time that I would — this deed and did so.

X 332 Q. You had also told him that you would settle with James Patrick and assume his interest, didn't you? I mean assume Bowman's obligations to James Patrick.

A. Yes.

X 333 Q. And that was put in writing?

A. Yes, sir.

X 334 Q. Then why was that writing left out in regard to Livezey?

A. I do not know why that was.

X 335 Q. You stated in your direct examination that you sold the note of Bowman's of $288.70 to you to T. W. McManus, of St. Louis?

A. Yes.

X 336 Q. When did you sell that note to McManus?

A. I can't fix the date exactly—whether it was the same day or whether I left it in St. Louis with my brother and he sold it a day or two afterwards. I am not positive in regard to that. I had some business with McManus the same day—June 19th—as I stated in my direct examination. I borrowed $4,000.00 from him that day, and it may have been the same day.

X 337 Q. You borrowed $4,000.00 from McManus?

A. Yes, sir.

X 338 Q. Don't you knew that that note never was in fact sold to McManus, but was simply transferred to him for him to be the ostensible owner—that was done in August—and that the arrangement was that he should put it in bank in order that it should be demanded of Bowman, and that your purpose in all that was to hurry Bowman to send the agreement you sent him?

Objected to as immaterial and irrelevant.

A. No; I am very positive—in fact, I am sure—that that note went into McManus's hands in good faith. I wanted the money on it and I sold it to McManus.

600 X 339 Q. What did you sell it to him for—what did you get?

A. My recollection is that I got the face of the note, $288.70.

X 340 Q. Where did you deposit that check?

A. I suppose I deposited that check in the Bank of Leadville.

X 341 Q. At what time?

A. In June.

(Mr. PARSONS:)

X 342 Q. What check do you refer to?

A. The check—whatever I got from McManus. I am not positive whether it was a check. It may have been a draft or something of that kind.

(Mr. MCGINNIS continues:)

X 343 Q. For how long did you borrow that $4,000.00 from McManus?

A. For six months.

X 344 Q. Was not it the understanding when you were over there with Bowman that you were to borrow that money and carry the expenses and he help to pay you the note and interest when it became due?

A. No, sir; there was no such understanding.

X 345 Q. That is, the money going into the Col. Sellers shaft?

A. No, sir; I do not know why I should borrow money to help Bowman out on my own collateral.

X 346 Q. Was not Bowman at that time carrying your brother James Patrick's interest?

A. He said he was; yes, sir.

X 347 Q. Then it is not so unreasonable that you should advance money a little while for Mr. Bowman, if he was up to that time carrying Mr. James Patrick's interest?

Objected to for the reason that the contract between Bowman and James M. Patrick was entirely independent of any arrangement between the said plaintiff and the witness, and it does not appear that the witness had anything to do with the contract or had any knowledge of it at the time it was executed, and whatever arrangement was made between the plaintiff and James M. Patrick
601 did not cast any obligation upon the witness in carrying Bowman in the performance of the contract of February 17th, 1882.

X 348 Q. I am not saying there was any legal obligation, but I am asking you what is there unreasonable in your carrying Bowman for awhile when he had been carrying your brother's interest in regard to the same matter.

Objected to for the reason that the reasonableness or unreasonableness of the arrangement has nothing to do with the issues in this case. It does not tend to throw any light upon it, and does not tend to prove any fact material to said issues.

A. The truth of the matter is that Mr. Bowman only carried my brother for six days after that.

X 349 Q. For how much?

A. Six days after June 19th. On the 25th, as I remember, my brother gave Mr. Bowman a note for his proportion—that is, one-sixth of the expenses that Bowman and I settled for at that time, which was $1,474.50—and the matter was settled between them in that way.

X 350 Q. But that note that your brother gave Bowman was not payable until about nine months afterwards?

A. Nine months; yes, sir.

(Mr. PARSONS:)

X 351 Q. State what interest it carried.

A. I do not remember; ten per cent., I think.

X 352 Q. At any rate, Bowman took his note without security *have* him at the time—nine months without security?

Objected to as entirely immaterial.

A. I took Bowman's note, too, without security.

X 353 Q. That was the manner in which you were doing business at that time—Bowman was doing as much for your brother as you were doing for Mr. Bowman?

602 Counsel for defendants moves to strike out the last question from the record as being a mere declaration of counsel for the plaintiff, as not being any evidence, as not calling for any answer that is material to the issues in this case.

A. No, sir; Bowman was not doing the same thing for my brother that I was for him in carrying this note, because there was a written agreement between Bowman and James Patrick that Bowman should carry him for a year on the contract. The agreement was that Bowman should remit as the indebtedness was incurred.

X 354 Q. Were you not demanding money from Mr. Bowman for the expenses of this shaft before you had paid them out—before they were due—when you were at that very time owing him money for traveling expenses in regard to the St. Louis claim matter?

A. No, sir; this whole amount, I think, with the exception of perhaps $100.00 or $150.00, had been paid—that is, the whole amount of $1,474.50 had been paid when I settled with Bowman, on the 19th of June.

X 355 Q. But you were demanding way back in March and April that Bowman should send you money?

A. No, sir; that was not a demand; that was simply a suggestion.

X 356 Q. Were you not suggesting or requesting of Mr. Bowman that he should send you money before you paid him anything, when you were at the same time owing him money for traveling expenses?

A. He had not at that time made up any statement of traveling expenses.

X 357 Q. But you knew that — were paid?

A. Yes.

X 358 Q. And you still owed him at that time?

A. Yes, sir; I owed him at that time, as I found out afterwards by his statement.

X 359 Q. But you knew your agreement was that you were to pay his traveling expenses and he made trips to New York?

A. Yes; for some amount.

603 X 360 Q. And you knew you owed him some amount and you were demanding money in March and April when you owed him money?

A. No, sir; I did not demand it.

X 361 Q. Or request it?

A. Yes.

X 362 Q. This draft of $952.32 that you sent to St. Paul, Minnesota, on July 6th, 1882—did that include $603.75, the amount that you had paid out before you went to St. Louis to make the settlement of June 19th, 1882?

A. Yes.

X 363 Q. It also included the money that Mr. Bowman was to advance for your brother James, didn't it?

A. Yes; the money that he was to advance for James would be in that. I think up to that time—in fact, I am quite positive that I never seen the agreement between J. M. and Bowman; I never saw that agreement, I think, until this suit was commenced.

X 364 Q. But you knew?

A. I knew the general terms of it.

X 365 Q. You knew that agreement with Mr. Bowman was to carry James Patrick—that is, to advance his interest?

A. Yes; that didn't effect me.

X 366 Q. You knew that was part of the agreement?

A. Yes.

X 367 Q. What part of the Col. Sellers and Accident mines now stands in your name as owner?

A. Twenty-five sixty-fourths.

X 368 Q. Have you made any conveyances of that part within the last two years?

A. I can't remember; I had some talk with my father in regard to conveying an interest to him. Whether I have made the deed or not I am not positive; that would be the only one, though..

X 369 Q. When was that talk?

A. That would be last fall; the fall of 1886.

X 370 Q. About what time?

A. Well, it was late in the fall or early in the winter; probably, I guess, along in November or December.

604 X 371 Q. This suit by Bowman against you was commenced about October 16th, 1886, a short time after this suit was commenced, was it not?

A. Some time after this suit was commenced.

X 372 Q. What interest did you convey?

A. I do not think I conveyed it.

X 373 Q. What amount did you intend to convey?

A. I was going to convey a one-twelfth interest, the amount I hold in trust for my brother, James M. Patrick; my brother, James Patrick, owed my father considerable money and wanted me to transfer it to him as security. I agreed to do so, but whether I did or not I do not remember.

X 374 Q. What dividends have been paid from the Col. Sellers and Accident mines since April 1st, 1887?

A. I could not say; April 1st, 1887.

X 375 Q. Up to that time what dividends have been paid?

A. There have been two dividends paid.

X 376 Q. When were they paid and the amount of each?

A. One was paid in August, 1887, of $8,000.00; one in October of $9,600.00. I would not state positively in regard to the August dividend, but my best impression is that it was $8,000.00.

X 377 Q. When did you cease to be—; from what time to what time were you manager of the Col. Sellers mine after the reorganization in 1882?

A. I was at the mine and had charge of affairs up to about September, 1886.

X 378 Q. What in the year 1886 until you got out—what position did Jack Drummond hold under you?

A. He was superintendent.

X 379 Q. Who succeeded you as general manager?

A. J. C. Whiting.

X 380 Q. When?

A. In September, 1886.

X 381 Q. What do you know about some fictitious names
605 being on the pay-roll of that company at that time?

A. I do not know anything about it. There was a charge that there had been fictitious names put on pay-rolls by the time-keeper at the mine, and Mr. Brunton—I made a mistake in regard to that. Mr. Brunton was superintendent up there for a month or six weeks after Drummond left and he told me about these matters; said he found out that there were some fictitious names on the pay-roll and I investigated it, but we were never able to establish any definite proof in regard to it. Mr. Brunton and I together, as I remember, several times had consultations with C. C. Parsons, who was acting as attorney for the Col. Sellers mine, and he came to the conclusion that the proof was not sufficient; it was not strong enough to cause us to bring an indictment against this man Stett, who was time-keeper of the mine.

X 382 Q. Where is Stett now?

A. He is in town, I think; I saw him in town yesterday.

X 383 Q. What explanation did he make of it?

A. He came into the office and partially confessed that he had done some thing wrongs, cried a good deal and begged off, and we let him out.

X 384 Q. That was while you were superintendent or general manager?

A. That was while I was manager; yes, sir.

X 385 Q. How many of those fictitious names were on these pay-rolls according to your best information?

A. I do not remember now; there was one that Kelly discounted—was the only one that we were absolutely positive about; there were others that we thought were suspicious, but we were not able to trace them up.

X 386 Q. How long had that been on the pay-roll?

A. I think only, as far as we could find out, only a month or so previous to that; I do not remember that they were on the pay-roll; I think they were mostly in the form of time-checks.

X 387 Q. Didn't the brother of Mr. Simmons, of Chicago,
606 come out here about that time to make an investigation about the accounts of the mining property while you were manager in the summer of 1886?

A. If I remember correctly, Mr. Simmons was here along in April or May, 1886.

X 388 Q. The brother of John Simmons?

A. Yes; George Simmons was here that summer. He is here every summer.

X 389 Q. Don't you know that he investigated the accounts while you were manager, and that he called on you to make explanations which were not satisfactory to him?

A. No, sir; I do not.

X 390 Q. Were not you requested to give way as manager to Mr. Whiting by the other owners of the mine?

A. No, sir.

X 391 Q. But you did give way at that time?

A. Yes.

X 392 Q. And Mr. Jack Drummond went out also?

A. Jack Drummond went out some time previous to that.

X 393 Q. How long prior to that?

A. I think in June, as I remember. If I remember correctly, we substituted Mr. Brunton for Mr. Drummond at that time.

X 394 Q. Was not it due to the fact that Mr. Brunton, coming in temporarily, that these fictitious names were discovered?

A. Yes; he discovered them. These fictitious names appeared at the time Brunton was there. I will state here that my accounts up to the time I left the mine were absolutely correct. I showed a balance on my cash book, which is the only book we kept at the Col. Sellers, which corresponded exactly with what was in the Carbonate bank at that time and also in the German National Bank of Denver. I do not think anybody ever questioned the accuracy of the accounts.

X 395 Q. Not that part of it; but didn't Mr. Simmons, who was here examining the matter in 1886, didn't he ask you for certain books and didn't you fail to produce them and tell him that they were lost or destroyed?

607 A. No, sir; he did not ask for these books. There were some books that were kept at the mine which were destroyed.

(Mr. PARSONS:)

X 396 Q. State how.

—. We always suspected that Stett burned the books. He had taken them away in order to cover up any crookedness that he had done up there prior to this time. He had been time-keeper up there for some months previous to that.

X 397 Q. Do you mean that after the fraudulent time-checks were discovered that Mr. Stett was permitted to be there at the mine and where the books were?

A. No; while we were investigating it he got wind of it. He was only there a few days, and he destroyed these books, as we all supposed, but those were not any books that had anything to do with me, because those books were kept at the time—the time books.

X 398 Q. Where is Mr. Drummond now?

A. Mr. Drummond is here in town.

X 399 Q. During the time you were general manager to what smelters did you ship the ore and by what railroads?

A. I shipped to a good many smelters. I shipped to the Arkansas Valley smelter here in town; I shipped to the Harrison reduction works in Leadville, and I think I sold some to the Manville Smelting Company.

X 400 Q. Did you ship any ore from Leadville?

A. A small amount to the American, and shipped a great deal away; more lately to the Colorado smelter at Pueblo, and the Pueblo Smelting Company at Pueblo. I shipped to the Omaha and Grant Smelting Company.

X 401 Q. Where?

A. Denver; also to the Kansas City Smelting and Refining Company of Argentine, Kansas; shipped some to the Argo Smelting Company or the Boston and Colorado Smelting Company, near Denver; also to Matthews and Webb, of Denver, and to another firm of ore buyers by the name of Vincent and Morrison.
608 I think that is all. Those were the principal purchasers.

X 402 Q. By what railroad did you ship to Pueblo?

A. Generally on the Denver and Rio Grande; sometimes I think they compelled us to ship by the South Park and shipped by way of Denver and Pueblo.

X 403 Q. By what railroad did you ship to Denver?

A. By both roads, the Denver and South Park and Denver and Rio Grande; we shipped some also to Canon City, I think, at that time.

X 404 Q. By what road?

A. The Denver and Rio Grande.

X 405 Q. What were the rates of freight per ton to Pueblo?

A. The rate was $5.00 most of the time.

X 406 Q. What were the rates per ton to Denver?

A. $5.00.

X 407 Q. Did you ever at any time, in any way, directly or indirectly, receive anything back from the smelters or the railroad companies in the way of rebates or refund on ore shipped?

A. Not one dollar, not one cent. I will state right here in that connection that I never got a cent of rebate from the railroads or from any merchant or from any smelter or from any one that I have had any dealings with.

(Mr. PARSONS:)

X 408 Q. You never got even a pass, did you?

A. I never had a railroad pass.

(Mr. MCGINNIS continues:)

X 409 Q. Is there any existing contract between the owners of the Col. Sellers mine and any one else for the sale of the property?

A. No, sir; not now.

X 410 Q. When did such an one cease to exist?

A. I think in 1886; perhaps the latter part of 1885.

Redirect examination by C. C. PARSONS, Esq.:

1 Q. Have you produced all the vouchers that were called for by counsel for the plaintiff relating to the expenditures which are contained in the statement that you sent to the plaintiff on the 5th of July, 1882?

609 A. No. I have got a number of others that were not asked for.

2 Q. Can you produce all of them?

A. I think I have all that are included in that statement—that is, the statement I mailed the plaintiff on July 5th.

3 Q. Will you produce them if called for by counsel for the plaintiff?

A. Yes, sir.

4 Q. You were asked if you informed the plaintiff as to the condition of the mine at the time that you mailed the draft of contract to him at Bayfield, Wisconsin, on receipt of his letter of the 16th of July, 1882. I will ask you if there was anything to report as to the condition of the mine at that time.

A. Nothing special. We were still at that time sinking in porphyry; had not made any discovery of mineral.

5 Q. Your attention has been called to what purported to be a copy of an article contained in the Leadville Herald of August 10th, 1882, and which assumed that there had been a strike of mineral in the Col. Sellers shaft on the 8th of August, 1882. I will ask you if, as a matter of fact, there had been any strike in the mine on the 8th of August, 1882, as described in said assumed article.

A. No, sir; there had not.

6 Q. I will ask you if it is not a very common thing in mining camps in general, and in this camp in particular, for newspapers to announce strikes in mines that had no actual existence.

A. Yes, sir; that is very frequently the case.

7 Q. I will ask you if at that time you were not engaged in a race for mineral with the jumpers who had located the Little Hope claim.

A. Yes; we were at that time still at work.

8 Q. I will ask you if reports did not appear from time to time of what purported to be a strike in the Little Hope shaft prior to the 10th of August, 1882.

A. Yes; there was talk about it before that. I do not
610 know that it was in any newspaper. It was the talk on the streets, and I refreshed my memory in regard to that by the testimony of Mr. Whiting. He went into that more fully than I remember.

9 Q. You were asked why you did not mail that letter of July 5th, 1882, to the address given you by Bowman on the 19th of June, 1882, as Bayfield, Wisconsin, instead of St. Paul, and your answer was that you may have received information which induced you to change the address from Bayfield to St. Paul. Have you any recollection upon that subject?

A. My answer was that I probably—that I must have had some information from Mr. Bowman in regard to that subject, because when I was in St. Louis he gave me his address as Bayfield, Wisconsin, and between the 19th of June and the 5th of July I must have had some intimation from him that his address would be Merchants' hotel, St. Paul.

10 Q. Does the fact that he mentions in his letter of July 16th, 1882, which was written at St. Paul—referring to your letter of June 22d, he states "that on receipt of your subsequent letters received here, I learn that is your desire or wish." Does that fact enable you to recollect that you were directed to address his letters at St. Paul?

A. Yes, sir; that shows that I must have some information from him that his address would be changed temporarily.

11 Q. Does the same fact enable you to recollect that Bowman received your letter of July 5th, 1882, addressed care of Merchants' hotel, St. Paul, and the fact that he acknowledges receipt of letters subsequent to June 22d at St. Paul, enable you to state that he received your letter of the 5th of July, 1882, at St. Paul?

A. I think he must have received it, because he was in St. Paul a few days after that letter of July 5th would actually reach St. Paul in due course of mail.

12 Q. Does he not state in his letter written to you from
611 St. Paul on the 16th of July, 1882, that his address thereafter would be Bayfield, Wisconsin?

A. Yes, sir; he so states.

(Mr. PARSONS:) Mr. McGinnis, I would like to introduce that letter of June 3d, 1882, in evidence.

Counsel for the defendants now offers in evidence a letter submitted by counsel for plaintiff to the witness on yesterday, dated Leadville, June 3d, 1882, addressed to Mr. F. J. Bowman, St. Louis, Mo., and signed by the witness W. F. Patrick, and asks that the same be copied into the record and marked Defendants' Exhibit "P."

It was thereupon stipulated by and between counsel for the plaintiff and for the defendants that the letter referred to may be read to the stenographer and copied into his notes and have the force and effect of the introduction of the original, for the reason that counsel for the plaintiff has expressed a desire to retain the original letter for the purpose of introducing it in rebuttal; which letter is as follows:

"LEADVILLE, *June 3d*, 1882.

"Mr. F. J. Bowman, St. Louis, Mo.

"DEAR SIR: I received your telegram in regard to Flynn's deeds. I hope you have succeeded in getting it from him. Major Wilson came to me this morning and told me he had transferred his interest in the Sellers contract to a man named Livezey and he wanted to pay his assessment. I told him that the time had expired and that I could not take it without referring the matter to you as under the contract, his time had expired some time ago. I could not rent an engine and had to buy one. I got a bargain on it and feel satisfied that I can sell it for as much or perhaps more than it cost. I wish you would let me know by telegram if you are willing to let Wilson in as I told you when you were here I would rather you would not as when we have so many in it, it is hard
612 to manage. If you don't consent, I will go on to St. L. for a few days and we could arrange a little pool there and raise money enough on part of our interest to complete the contract without any further expense to ourselves and retain control of it. The foreman of the A. Y. told Stebbins this morning that they were working right towards us and did not know how much mineral they had as they were not in either the top or bottom of it although

they had three sets of 12 feet of timbers in it. In other words in the drift running towards our ground, they know they have 12 feet of ore but do not know how much now is above or below them. The ore lies nearly horizontal and so we will not probably have to go as deep as we had anticipated. Although the jumpers are still at work, I am confident we can beat them to mineral and then there will be no question in regard to title. If you think you could organize such a pool, I would go on and take maps &c. and help you and we could get back what we are in and have an interest left. We could recommend the scheme as a good venture and there would be a chance of a big thing. Let me know promptly by telegram.

"Yours truly, W. F. PATRICK."

13 Q. You say that you did not know that you were not aware of the transfer by Wilson to Livezey until three weeks after it occurred, and say that you do not recollect the exact time that you signed the transfer of said interest from Wilson to Livezey as a witness.

A. No; I do not; I was under the impression that I signed it on the 11th of May, the date put down there, and I may have done so and forgotten about it at the time I wrote to Bowman.

14 Q. Have you any other recollection concerning that transaction than that that you have stated?

A. No, sir; I have not; I may have signed that as a wit-
613 ness and passed from my memory altogether at the time I wrote to Bowman, in June 3d.

15 Q. You were asked concerning the letter written on the 23d of December, 1881, in which you suggested to your brother, James M. Patrick, to sell an interest in the St. Louis mine to the plaintiff. I will ask you whether or not the plaintiff was acquainted with the mine, had before that examined it, and knew all about it.

A. Yes; Mr. Bowman was here in the latter part of November of that year, 1881, and had made a good many inquiries in regard to the mine, and I think that he visited the mine; went up to the mine and had a talk with a man named Briden, who at that time had charge of the mine; he was custodian of the mine for the Colorado Prince or Mineral Boy people; I am not sure which, but it was substantially the same ground, though, and he knew almost as much about the mine as I did. I had only been in the mine at that one time—at the time I speak of in that letter—when I went up there with Mr. McKenzie.

16 Q. Did the plaintiff already have an interest in the St. Louis mine?

A. He had a contingent interest from James M. Patrick and myself.

17 Q. Was he not at that time engaged in a scheme to settle the conflicts with the St. Louis, to consolidate other properties with it, and to organize a stock company for the purpose of either working the mine or selling the stock?

A. Yes, sir; he was engaged in that. I found last night a gen-

eral statement and plan of such an organization. He dated it some time later than that.

18 Q. Did you in your letter of December 23d, 1881, or in any communication subsequently to your brother direct him to make any false representation as to the condition of the mine to Bowman as an inducement for him to purchase an interest in it?

A. No, sir; I did not. *With* the explanation I went into
614 there was for my brother's benefit; he had a very high opinion of the mine, and I knew that he would consider the price I named rather small, and in order to convince him that $15,000 or $18,000 or even $10,000 was ample for it I put that in there. I made no request of him to make any false representation to Bowman. However, Bowman had expressed a desire to buy an interest of me, and, of course, I wanted to sell and wanted to get as much as possible for it.

19 Q. Have you since the examination was closed yesterday found a draft which you drew on Bowman, on the plaintiff, some time in May, 1882, for $465.00, and the certificate of protest which has been introduced in evidence?

A. Yes; I have searched for the papers that were requested by Mr. McGinnis and I found that draft.

20 Q. Will you produce it now?

A. Yes. (Witness produces draft.)

21 Q. I now hand you what purports to be a draft dated Leadville, Colo., May the 13th, 1882, drawn on Frank J. Bowman, Boatman's savings bank, St. Louis, Missouri, and signed by you, for the sum of $465.00, and attached to which is a certificate of protest, and ask you if that is the draft that was drawn by you on Bowman on the 13th of May, 1882, of which you have testified, and that it was returned to you with the certificate of protest attached.

A. Yes, sir; that is the draft; that is the original draft drawn by me at that time, May 13th, 1882, on the plaintiff.

Counsel for defendants now offers in evidence the draft, certificate of protest, and memorandum check referred to by the witness, and asks that the same be marked Defendants' Exhibit "P," which is in the words and figures as follows, to wit:

"$465.00. LEADVILLE, COL., *May* 13, 1882.

"At sight pay to the order of the Bank of Leadville four
615 hundred and sixty-five dollars, with exchange, value received, and charge to account of

W. F. PATRICK."

To Frank J. Bowman, Boatman's saving bank, St. Louis, Mo.

(Endorsement across face:) "Protested for non-payment at St. Louis, Mo., May 18th, 1882. Charles S. Taussig, notary public."

(Endorsement on end:) "The Bank of Leadville, Colorado."

(Endorsement on back:) "Pay J. C. Van Blanson, cashier, or order, for collection account of Bank of Leadville, Col. Geo. R. Fisher, cashier."

(*Copy of Protest.*)

"$465.00. LEADVILLE, COL., *May* 13, 1882.

"At sight pay to the order of the Bank of Leadville four hundred and sixty-five dollars (with exchange), value received, and charge to the account of

"W. F. PATRICK.

"To Frank J. Bowman, Boatman's savings bank, St. Louis."

"Endorsed: Pay J. C. Van Blarcom, cashier, or order, for collection account of Bank of Leadville, Leadville, Col. Geo. R. Fisher, cashier. A true copy. Attest: Charles S. Taussig."

Protest.

Chas. S. Taussig, attorney-at-law, 509 Olive street, rooms 1 and 2, St. Louis, Mo.

"STATE OF MISSOURI, }
"*City of St. Louis.* }

"Be it known that on the 18th day of May, 1882, — the Bank of Commerce of St. Louis, Mo., the holder of the original bill of exchange, a copy of which is hereon written, I, Chas. S. Taussig, notary public for the city of St. Louis, in the State of Missouri, duly commissioned and qualified, residing in the city of St. Louis,
616 in said State, presented the same at the place of business of Frank J. Bowman, 8th and Pine Sts., St. Louis, Mo., to F. J. Bowman in person and demanded payment thereof, which was refused; also at the Boatman's savings bank to its paying teller and demanded payment thereof, which was refused. Whereupon I, the said notary public, at the request aforesaid, have protested and do hereby solemnly protest against all persons and every party concerned therein, whether as maker, drawer, drawee, acceptor, payer, endorser, guarantee, surety, or otherwise howsoever, against whom it is proper to protest for all exchange, re-exchange, damages, interest, and costs accrued and to accrue by reason of the non-payment thereof.

"Thus done and protested, at the city of St. Louis aforesaid, on the eighteenth day of May, 1882; of all which I have given due notice in writing and print to the parties concerned in the manner following: To W. F. Patrick and to Bank of Leadville, by enclosing both in one envelope addressed to Bank of Leadville, Leadville, Colorado, Geo. R. Fisher, cashier, and depositing the same in the post office at St. Louis, Mo., May 19th, 1882, at 10 a. m., postage prepaid.

"In testimony whereof I, the said notary, have hereunto set my

hand and affixed my notarial seal on the nineteenth day of May, 1882.

"Term ends June 29th, 1885.

"CHARLES S. TAUSSIG,
"*Notary Public, St. Louis City, Mo.*

"Recorded Book F, folio 217.
"Fee, $2.75.

"STATE OF MISSOURI, } ss:
City of St. Louis, }

"Before the undersigned, a notary public within and for said city, came Charles S. Taussig, who, being by me duly sworn, on his oath says that the statements set forth in the foregoing certificate are true.

"CHARLES S. TAUSSIG.

"Sworn to and subscribed before me this 19th day of May,
617 A. D. 1882.

"FRANK E. RICHEY,
"*Notary Public.* [SEAL.]"

(*Memorandum.*)

"BANK OF LEADVILLE,
"LEADVILLE, COLO., —— —, 188–.

"Protested draft, Bowman, 465.
"Fees, 2.75.
"$467.75.
"Charge W. F. PATRICK.

(Endorsement across face:)

"Paid March 22, 1882. Bank of Leadville, Leadville, Colo."

(Answer of witness continued:) Also attached to that is a memorandum showing that it was charged to my account on return to Leadville.

At the hour of twelve m. of said day the taking of testimony was continued until two o'clock p. m. of said day.

At two o'clock p. m. of said day the examination was resumed.

WILLIAM F. PATRICK, re-examination of, resumed by C. C. PARSONS, Esq.:

22 Q. You were asked in your cross-examination this morning whether it was true that you made some arrangement with T. W. McManus concerning the Bowman note by which you were to hurry Bowman into the contract for the purchase of his interest in the Col. Sellers and Accident claims, and you were also asked whether it was not true that you transferred or assigned the Bowman note for $288.70 to McManus some time in August, 1882. Have you made

any examination or have you obtained any information since your examination this morning which enables you to fix the exact date on which you negotiated said note?

A. Yes, sir; I find by reference to my bank book that on June 28th, 1882, I deposited the proceeds of that note, $288.70, less
618 a certain amount of discount—fifty-five cents, I think they charged—which must have been for the collection some check or draft I had; also on the same day I deposited $184.30 that I had collected from John Livezey, Jr., on the same account.

23 Q. Deposited where?

A. In the Bank of Leadville.

24 Q. You mean that the $184.30 that you collected from Livezey was the one-eighth of the expenses of sinking the Col. Sellers shaft that were included in the settlement of June 19th, 1882, that you had with Bowman?

A. Yes, sir; that is Livezey's share of the expenses, one-eight the total, the expenses being $1,474.50, and, as I stated in my direct examination, he had offered me this money before I went to St. Louis, and I refused to take it until I could see Bowman, and on my return from St. Louis he paid me this money, and I deposited this money and also the money derived from the sale of this note of Bowman's on the same day and at the same time.

Counsel for defendants now offers in evidence the agreement made between the several owners of the Col. Sellers and Accident mines and William F. Patrick, dated the 16th of August, 1882, which is admitted in evidence without objection, and *of* proof as to signatures and handwriting being waived, and asks that the same be marked Defendants' Exhibit "Q," which is in words and figures as follows, to wit:

"This agreement made and entered into this 16 day of August, 1882, by and between Theodore C. Stebbins, Lyman Robison of Leadville, Sam'l J. Glover, Chicago, John Livezey Jr. & Joseph C. Whiting of St. Louis, all of Leadville, Colo. & Harvey Howard of Wooster Ohio parties of the one part, and William F. Patrick of Leadville of the other and each and all being parties to this agree-
ment interchang-ably & each & all agreeing the one with the
619 other. Witnesseth:

That whereas heretofore & on the 17 day of February 1882 the said Stebbins, Robison, Glover & Howard made an agreement with said Patrick and Frank J. Bowman of St. Louis, and whereas it is believed that said Bowman no longer has any interest in said contract and said Patrick is willing to protect & hold harmless the said other parties off from any claim which may be made by said Bowman: And whereas the said Livezey & Whiting have become by purchase interested in the subject matter of said contract & have acquired their interest subject to its provisions: And whereas said contract related to the development of the Col. Sellers & Accident mining claims situate in California mining district Lake county Colorado & thereunder a shaft has been sunk on said Col. Sellers claim to the present depth of about two hundred & forty feet: And

whereas since the commencement of said shaft other parties have attempted to take possession of said Col. Sellers claim & have been & are now engaged in sinking a shaft thereon & disputes, conflicts, suits & litigation have arisen & will further spring up concerning the title to said property and under the original & other agreements between all or some of the parties, it is left in doubt as to the person or parties liable for the expense & disputes have arisen concerning the claims & obligations of the several claimants of the property which it is desired to adjust & determine: And whereas at the time of the execution of the original agreement a deed to one-half of the property was executed & placed in escrow in the hands of C. C. Parsons to be delivered upon the performance of a condition and whereas there is considerable uncertaonty as to when said condition may be deemed to have been complied with & a lode or vein is now by all believed to have been struck and it is desired to so far vary that condition or define it as to express the exact time when it
620 shall be deemed to have been complied with, and whereas certain other things provided for by said contract are still unfinished and unperformed and it is desired that this agreement shall fully express the present and existing convention of the parties:

Now therefore in consideration of the premises, of one dollar by each to the other paid, it is agreed by and between the parties, that is to say: The said Patrick agrees to continue uninterruptedly, barring accidents to shaft or machinery the sinking of the shaft now being worked on the Col. Sellers claim by him under the original contract until the same shall have reached a depth of not less than two hundred and fifty feet. He further agrees to continue prosecution of the application for a patent thereto and to the Accident mining claim, & to pay all the costs, charges & expenses incident thereto save the costs and expenses of any litigation which may arise or grow out of or be incident to such application & save also attorneys' fees which may be payable on account of or be incurred in and about said application or said suit, and as to such or any attorney's fees which may be paid or which may accrue in the procurement or defense to the title of said claims he agrees to pay such proportion as shall be equivalent of his interest in the property. He further agrees that upon the delivery of the deed to him as hereinafter provided, to guarantee, save & hold harmless the said Stebbins, Robison, Howard and Glover & Whiting, & Livezey of and from any & all costs & damages which may be claimed or recovered from each or all of said parties by said Bowman by reason of the delivery of said deed, the said other parties hereto other than said Patrick hereby agreeing that as soon as the shaft now being sunk by said Patrick on the Col. Sellers claim shall have reached
621 the depth of two hundred and fifty feet from the surface, to deliver or cause to be delivered to said Patrick the aforesaid deed for a one-half interest in & to the said mining claims which is now in escrow in the hands of C. C. Parsons, and they do jointly & severally agree that the sinking of said shaft to the depth aforesaid shall be & be taken to be such a full performance of this and

the original contract as that *sd* Patrick shall be entitled to receive his deed.

Said Patrick further agrees that from this time to wit; the delivery of the deed they & each of them will pay his & their proportion of all the costs & expenses including attorneys' fees of any and all controversies, suits or actions which may arise be brought or defended for & on account of either of said claims & the title thereto including any & all fees for attorneys whether for suits or consultations or any other sort of legal work the proportion above refundbeing the equivalent of the proportionate interest which each may own in the property at the time the expenses are or may be incurred or paid. In other words it is agreed by all the parties hereto that each shall pay his proportionate share of the expenses of maintaining and defending the title to the property such proportion to be determined & measured by his interest therein. It is further agreed between the parties hereto that the original agreement as to the machinery & shaft-houses erected or to be placed or erected on said property shall be & remain in force. It is agreed between the parties that for the purpose of this agreement & determination of the amount which he, Patrick, is to pay hereunder the said interest shall be taken to be seven-sixteenths, & to include the interest formerly held by Bowman less the one-sixteenths heretofore transferred to s'd Livezey.

In witness whereof the parties hereto have hereunto set their hands this 15th day of August, 1882.

622 In presence of—

LYMAN ROBISON.
SAMUEL J. GLOVER,
By GEO. N. SIMMONS,
Attorney-in-Fact.
JNO. LIVEZEY, JR.
J. C. WHITING.
THEODORE C. STEBBINS.
W. F. PATRICK."

Recross-examination by E. McGINNIS, Esq.:

X 1 Q. What is a strike called here in regard to finding ore in Leadville; is it getting a stringer or streak of ore or finding ore in a body?

A. In my opinion, a strike would be finding a body of ore.

X 2 Q. When you collected the note of $394.85 from Stebbins and Robison did you pay any part of what you received to Livezey?

Question objected to as immaterial.

A. My recollection is that I did. We settled up, Livezey and I, as soon as we could.

X 3 Q. When did you?

A. We had a settlement along in 1883. I was lending Livezey money, a good deal of money, at the time—at different times; loaned him $100.00, $200.00, or $300.00 at a time, and we settled up, and I think this amount was taken into consideration.

X 4 Q. Have you any paper showing when it was taken into consideration in this settlement?

A. No, sir; I have not.

X 5 Q. Have you any stub check book or cancelled check showing that you ever paid it to him?

A. No, sir; the money that I gave to him I loaned him.

X 6 Q. Can you show any receipt, stub, or check or any writing of any nature whatsoever where you paid or allowed Livezey one-eighth of $384.95?

Objected to as immaterial and irrelevant.

A. I haven't any distinct recollection of anything of the kind now.

623 And further witness saith not.

W. F. PATRICK.

Subscribed and sworn to before me this 29th day of January, A. D. 1888.

[SEAL.] JAMES B. KNOBLOCK,
Notary Public.

JAMES M. PATRICK, one of the defendants, being first duly sworn according to law, testified as follows:

Direct examination by C. C. PARSONS, Esq.:

1 Q. State your name, age, residence, and occupation.

A. Forty years of age; residence, Denver, Colorado.

2 Q. Occupation?

A. Interested in mines and ranching.

3 Q. Are you one of the defendants in this suit?

A. Yes, sir.

4 Q. Are you acquainted with the plaintiff, Frank J. Bowman?

A. Yes, sir; I am.

5 Q. How long have you known him?

A. My recollection is that I first met Mr. Bowman when I was quite a young man; it may have been twenty years ago. I did not know him thoroughly until 1880 or 1881, when I was introduced to him by my father.

6 Q. Did you know anything about the negotiations between your brother, W. F. Patrick, and Frank J. Bowman which led to the execution and delivery of the contract which has been introduced in evidence and known as Defendants' Exhibit "A" prior to its execution, dated the 17th of February, 1882?

A. I did not know anything prior to its execution that I know of.

7 Q. On the 26th of March, 1882, did you have any business transaction with the plaintiff, Frank J. Bowman?

A. Yes, sir; I was in there; in his office.

8 Q. Where?

A. At the corner of 8th and Pine streets, in the city of St. Louis.

I think I had called to see him; had been calling some dif-
624 ferent times before that in the matter of the St. Louis and Miner Boy claims, in which my brother and I were interested and in which Mr. Bowman, I think, at that — held a contingent interest.

9 Q. State what business transaction you had with him on the day mentioned.

A. I called to see him on this business of the St. Louis and Miner Boy claim, and either at that date or shortly previous to that he told me of this contract he had with my brother to sink a shaft to mineral or limestone rock on the Col. Sellers and Accident claims, and he incidentally remarked to me that he would like to part with a portion of his interest.

10 Q. What did you say to him?

A. My impression now is that it was the day or day before or two before the 25th that he spoke to me about it, and he asked me and told me that he wanted to part with this interest, and asked me if I would not take a portion of it; I told him that I was not in a financial condition to talk at that time. "Well," he said, "I will let you in on the amount of the assessment now due or hereafter to become due, when it is ascertained by the figures of the venture kept at Leadville." I told him that I had no money, and he said, "I will take your note." I asked him how long he would take a note for, and I think he first said that he would give me six months. I told him that that would not do, that I had payments to meet during the summer and family expenses which I thought would take all my money, but that if he would make it for one year I would consider the proposition and let him know about it; in other words, he agreed—he agreed on the proposition I made, which was that if he agreed to carry me for one year and pay my assessment on it that I would give my note from time to time as the settlements were made or as he paid them. I think I considered over the matter probably only one day, it may have been two days, and
625 on the 25th of March I made a contract with him, the same contract which has been put in evidence.

11 Q. I now hand you a contract herefore introduced in evidence and marked Defendants' Exhibit "O," and ask you if that is the contract that you made with the plaintiff, Frank J. Bowman, at the time that you have stated.

A. Yes, that is the contract, sir.

12 Q. In whose handwriting is that?

A. My impression is that it is in the handwriting of Mr. Wolf, who was in the employ of Mr. Bowman, but then I cannot quite remember, but that is my impression; it almost amounts to a certainty.

13 Q. Was that contract entered into the date which appears on the instrument itself?

A. Yes, sir.

14 Q. Did you have any conversation with the plaintiff concerning this contract between the date of its execution, March 25th, 1882, and the 25th of June, 1882?

A. Yes; at present I recollect very distinctly a conversation that occurred about that time or before the time the contract was signed.

15 Q. What was that?

A. He told me—I asked him why he was anxious to sell or transfer his interest or shift the responsibility for a portion of his interest. He said because he was short of money, to begin with, and also because the mine was in litigation or the venture was in litigation by reason of jumpers who were then on the property, and, to use his own expression or about his own expression, he said *he said* that he had so much litigation that he didn't want anything to do with a mine in litigation.

16 Q. Did you have a settlement with him of your accounts under that contract on the 25th of June, 1882?

A. Yes, sir.

17 Q. Where was that settlement?

A. That settlement was made in Mr. Bowman's office, I think, a day or two after the departure of my brother, or about the time of my brother's departure for the West.

626 18 Q. In what manner did you settle and in what manner did you arrive at the amount that was due from you to him under that contract?

A. We arrived at the amount, as I now remember, by dividing the amount—the total amount of costs which my brother had presented to Mr. Bowman on the 19th—by six to represent the share for which my interest carried by Bowman was liable.

19 Q. What did that amount to?

A. It represents the amount of that note; $245.75 I think it is.

20 Q. Now, you may state how you settled that amount with him.

A. I gave him my note at nine months from date; that date. He said that he could use my note, even if it was at that long date, as collateral, and would have to use it. I suggested to him that that was the way I wanted to put it to correspond with the contract.

21 Q. I now hand you note, dated St. Louis, June 25th, 1882, for $245.75, purporting to be signed by you and made payable to the order of Frank J. Bowman at the Boatman's savings bank, St. Louis, and ask you whether that is the note that you executed to him at that time in settlement of your liability to him under the contract of the 25th of March, 1882.

A. Yes, sir; this is the note.

22 Q. In whose handwriting is that note?

A. All excepting the signature and "due March 25th, 1883," in the left-hand lower corner, is the hand of Frank J. Bowman; the balance is mine.

23 Q. Is that your signature?

A. The signature is mine.

24 Q. State whether or not you ever paid said note; and, if so, how and when.

A. I paid it as endorsed on the back here by Mr. Bowman—$150.00

on January 20th, 1883; also on March 17th my check. I also have my stubs for the same payments.

25 Q. Have you them with you?

A. Yes; I have.

26 Q. Stubs of what?

A. Stubs of my check book.

27 Q. What do they show?

627 A. Showing the payment and the exact amount I paid, including the balance and interest at that time due, on March 17th, $111.00 and some odd cents.

(Mr. McGinnis:)

28 Q. $150.00 when?

A. $150.00 January 20th, 1883, and $111.00 and some odd cents on March 17th, 1883.

(Mr. McGinnis:)

29 Q. And the balance?

A. March 17th, 1883, this endorsement shows, but I will not say that they correspond with my check book.

(Mr. Parsons continues:)

30 Q. Refer to your check book.

A. My impression is that this has been discounted, referring to the margin.

31 Q. Refer to your check book and see when those payments were made.

A. Check No. 43, January 20th, 1883, $150.00 to the order of Frank J. Bowman, paid on my note made by me for $245.00 and blank cents.

(Mr. McGinnis:)

32 Q. On what bank?

A. On the Fourth National bank.

(Mr. Parsons continues:)

33 Q. Now turn to March 17th.

A. "Check No. 67, March 17th, 1883; amount, $111.27; payable to order of Frank J. Bowman in full of note," endorsed on back. On the Fourth National bank that is.

Counsel for defendants now offers and reads to the commissioner the note referred to, being as follows:

"$245.75. St. Louis, *June* 25, 1882.

Nine months after date I promise to pay to the order of Frank J. Bowman two hundred and forty-five $\frac{75}{100}$ dollars at Boatman's savings bank, St. Louis, value received, with interest at the rate of ten per cent. per annum.

(Signed) JAS. M. PATRICK."

And on the margin, "due March 25th, 1883." On the back is endorsed, "paid on the within $150.00, January 20th, 1883," and also endorsed, "paid by check March 17th."

Which is admitted in evidence instead of the original by
628 consent of counsel, because the note is torn and mutilated.

34 Q. Why, if you know, was that note given for nine months?

A. It was given to correspond with the contract; this was his settlement which Mr. Bowman had paid after the formation of the contract and signing of it, and he didn't know until that date what the amount of the liability would be. It was given at nine months to correspond with the balance of the year left then unexpired.

35 Q. Is it true that that note and the contract were executed on the same day?

A. No, sir; it is not possible that it could have been so.

36 Q. Is it true that the contract was executed and delivered on the 25th of June, 1882, instead of the 25th of March, 1882?

A. It is not.

37 Q. Do you know anything about the assignment by the plaintiff of an undivided one-eighth interest in the contract of the 17th of February, 1882, to William H. Wilson?

A. What date is that agreement?

38 Q. May 6th, 1882.

A. Mr. Bowman spoke to me about it and stated there had been such an assignment.

39 Q. When?

—. Along about the time, the 25th of June or before; I am positive it was before that.

40 Q. What did he say about it?

A. He said that he had met, that Mr. Wilson called upon him for an interest for some services which he claimed which Mr. Bowman stated himself he could not exactly see, and supposed he had to make it to him, and that Mr. Wilson afterwards assigned this interest or sold it to Mr. Livezey, then in the pawnbroking business at Leadville.

41 Q. Did he at that time say anything about a forfeiture of that contract by Wilson on account of his failure to pay his proportionate share of the expenses chargeable to that in-
629 terest?

A. He said he knew Mr. Wilson. He had introduced himself as a friend from St. Louis; that he had formerly known him in St. Louis and that he knew something of Mr. Wilson; that he didn't think he was in financial circumstances to hold up under the contract and to pay his proportion and that he supposed the interest would revert—might revert back possibly to him.

42 Q. When did he say that?

A. He said that somewhere between the 25th of March and the 25th of June—it may be on the 25th of June—somewhere between those dates. He spoke about it several times.

43 Q. Can't you fix the time more definitely in which he made

that statement—whether it was before or after the 19th of June, 1882?

A. He spoke to me about the 19th of June; there is no doubt about that; not a particle of doubt about it. He also spoke about it before the 19th of June, too. I know he spoke about it before the 19th of June.

44 Q. Did you know that on the 19th of June, 1882, Wilson had assigned this interest to Livezey?

A. I think Mr. Bowman told me of that previous to the 19th of June; about the 19th of June. I know he spoke of it several times.

45 Q. Do you know anything about the defendant William F. Patrick drawing a draft on the plaintiff in the month of May, 1882, for $465.00?

A. Mr. Bowman told me that W. F. Patrick had drawn on him and that he had, much to his regret, let the draft go back.

46 Q. Did he say why?

A. He said because he hadn't the funds to meet it, and that he hoped that Will would come on soon and relieve him by taking his note, if he could use it, and he had no doubt he could. He asked me when Will would be on, and I told him I didn't know.

47 Q. When was this conversation?

630 A. This was some time after that.

(Mr. McGINNIS:)

48 Q. After what?

A. After May; after the draft was drawn.

(Mr. McGINNIS:)

49 Q. When was the draft drawn?

(Mr. PARSONS:) May 13th.

(Witness continues:) He also asked me if I would take the entire interest on the same basis that I had taken the interest before.

(Mr. PARSONS continues:)

50 Q. When was that?

A. About the same time that he spoke about the draft, and he spoke of it once or twice before and I refused to take it.

51 Q. Was anything said by the plaintiff at the time that you gave him the note on the 25th of March, 1882, about the manner in which the mine was being worked and about the expenses incident to the working of the same or did the plaintiff express any dissatisfaction with the enterprise?

A. Well, he said that he had hoped to be able to get some gentlemen to go into the matter, to carry a larger portion of the interest and leave W. F. and himself free with an unincumbered interest, but he hadn't succeeded in doing so. He also stated that he wished W. F. and had written to him to hold the property and keep his contract good by doing some work every ten days. He told me also that W. F. had written to him to say that it was impossible, as it would render their contract null and void; that he dif-

fered with him, and of course he didn't understand all of the technicalities of mining law, but he thought that such a course would be approved by the courts.

52 Q. Where were you residing at that time?

A. I was residing at that time in Tennessee, spending my winters mostly at the residence of my wife's folks in St. Louis.

53 Q. When did you come to Colorado to live?

A. I came here in September, 1885.

54 Q. And previous to that you lived in Tennessee, spend-
631 ing a good deal of time in St. Louis?

A. Spending winters along about Christmas—a month before or a month after.

55 Q. Did you have any conversation with the plaintiff after his return from the woods of Wisconsin and in September, 1882?

A. My impression is that I did.

56 Q. What was the tenor of that conversation?

A. I think we met once or twice during that winter and fall.

57 Q. Previous to the 19th of October, 1882?

A. Previous to the 19th of October, 1882. I didn't arrive, now as I recollect, in St. Louis until shortly before the 19th of September, as I recollect.

58 Q. September or October?

A. October.

59 Q. State whether or not you met your brother, W. F. Patrick, in St. Louis about the 19th of October, 1882.

A. Yes, sir; my first recollection is that I met him in the morning of the 19th of October in Mermod, Jaccard & Co.'s jewelry store, on the corner of Fourth and Locust streets, somewhere between ten and eleven o'clock, as I remember. I was with my wife and he was with his wife.

60 Q. Did you and W. F. Patrick go to Bowman's office together on that day for any purpose?

A. Yes, sir.

61 Q. For what purpose—what did you do there?

A. I went up with my brother—I think at his suggestion—or, at least, we went together, and he there presented a note to Bowman.

62 Q. Who did?

A. My brother, W. F. Patrick, presented a note to Bowman and demanded a deed for a quarter interest in the Col. Sellers mine, as per contract I think he had, but I do not know that I saw the contract at that time. I may have seen it.

63 Q. What was done there?

A. Mr. Bowman acquiesced in the suggestion and suggested that
he had made a contract with me for a twelfth interest and
632 wanted to know what would be done with that; at least, there was some talk about that, and, to settle that, I wrote an order to Mr. Bowman to transfer the entire quarter interest to my brother, W. F. Patrick, one-third for me and two-thirds for him, as I now recollect.

64 Q. What was said in that conversation about the Livezey interest which he received by assignment from Wilson?

A. There was some talk about that, and my brother said that on his return to Leadville he would make a deed for that to Mr. Livezey?

65 Q. What did Mr. Bowman say?

A. He said that would be all right.

66 Q. Who surrendered the note of Bowman's for $288.70, dated the 19th of June, 1882, and payable to William F. Patrick, to the plaintiff, Bowman, on that occasion?

A. Well, my brother, W. F. Patrick, had the note there and presented it to Mr. Bowman; my impression is that he did not surrender it that day, though, until he got his deed; he may have done so.

67 Q. Were you present on the 20th of October, 1882, when the deed from Bowman to your brother, William F. Patrick, was delivered?

A. I have no recollection of being present; I feel positive I was not.

68 Q. Did you on the 19th or 20th of October or at any other time receive from the plaintiff the deed conveying the plaintiff's interest in the Col. Sellers and Accident mines or mining claims to your brother, W. F. Patrick?

A. No, sir; I do not remember of ever seeing that deed, not that I remember of.

69 Q. Were you at that time the agent of your brother to surrender the note that I have mentioned and to receive the deed mentioned in my last question?

A. I was acting in no such capacity and had no authority.

70 Q. Had you any authority to surrender the note mentioned or receive the deed from Bowman to your brother?

633 A. No, sir; I had no authority; I have no recollection of ever having seen the note but on that occasion.

71 Q. I now call your attention to the answer of the plaintiff to question No. 51 of his direct examination, which reads as follows: "A. The transaction was consum-ated through James M. Patrick, who came to me at my office and on my own papers, as I now recollect, wrote the request at my office that I would transfer my interest to his brother William, and it was pursuant to what was then said and done by James M. Patrick that I made the conveyance of my interest, delivering the deed to James M. Patrick, as I think at that time he was acting or purporting to act in obtaining the deed for his brother William and I delivering it to him, the deed conveying my interest, I am sure. This was about October 19, 1882, and I am sure that he carefully refrained from intimating to me that there had been any discovery of ore at the time of procuring my transfer," and ask you to state what the facts are in regard to said statement.

A. I know I did not act as his agent?

72 Q. As whose agent?

A. As my brother's agent, nor did I go there and make a demand

for a deed, nor did I take any part except that of an observer at that time.

73 Q. Did you act or purport to act as the agent of William F. Patrick in obtaining the deed for him from Bowman?

A. No, sir; I did not, because my brother was there himself and could act as principal and did act as principal. I simply went with him at his request.

74 Q. State whether, about the 19th or 20th of October, 1882, or at any other time, the plaintiff questioned you concerning the condition of the Col. Sellers mine or the discovery of ore, and that you represented to him that nothing had yet been discovered, but
634 that Will, meaning your brother William F. Patrick, was taking his chances that he might thereafter find something.

A. No, sir; he did not do anything of the kind. I remember distinctly, too—I do remember that previous to that date I spoke quite encouraging of it.

75 Q. To whom?

A. To Mr. Bowman of the property. I did that because I knew that Mr. Bowman had been short or somewhat lagging in making his payments, and I thought it would have the effect of making him more prompt in relieving my brother of the entire responsibility of carrying the contract.

76 Q. Was anything said to you at about the 19th or 20th of October, 1882, or at any other time by Bowman or any inquiry made by him as to the condition of the property?

A. I think about the 19th day of June, between that and the 25th, about the time I gave him that note, he asked me. That is the time I spoke as encouraging as I was warranted in speaking of the property, and on the 19th of October we went in there. I remember very distinctly Mr. Bowman was very busy and had but a very few minutes to devote to us, and about the only question he did ask was in reagrd to this interest of mine, and also, speaking more particularly to William F. Patrick, he spoke of the interest of Mr. Livezey.

77 Q. Did you say to him at any time in the month of October, 1882, that nothing had yet been discovered in the Col. Sellers mine and that Will was taking his chances that he might thereafter find something?

A. I could not have said that, because I knew nothing about it.

78 Q. Did you say that?

A. I did not say it. I knew nothing definitely.

79 Q. I will ask you whether at any time in the month of October, 1882, you, in response to a question propounded to you by the plaintiff as to whether anything had been discovered,
635 said "that there was nothing in this but what is all right," and then the question propounded to you, "You hav'n't found anything there," in substance, and your reply, "Oh, no, Will is taking his chances on that."

A. "Nothing in this." What does that refer to?

80 Q. That is the answer?

A. No, sir.

81 Q. Did anything like that in substance occur between you and the plaintiff in the month of October, 1882?

A. No, sir. I wish to state right here that I do not know that I ever went into Bowman's office but what he was so busy that he would hardly give me any attention any time, and there was no chance for any extended conversation.

82 Q. Did you see the plaintiff or have any conversation with him about the 19th of October?

A. I think I met Mr. Bowman several times during that winter.

83 Q. Did you have any conversation with him during the fall of 1882 or the winter of 1883 concerning the Col. Sellers mine?

A. I think I did along about Christmas or thereafter.

84 Q. What was that conversation?

A. I think that it may have been in the early part of the winter or January or February, 1883. I told him things were looking more favorable out there at the mine, and that I was sorry for his sake that he sold out and was glad on behalf of my brother that he had done so, and he expressed himself as more than satisfied with the agreement—with the status of affairs; that he had not been able to pay his assessments, and that even if he had the constant fear of litigation and jumpers would have caused him to sell out, and for me to express my congratulations to my brother when I saw him. I wrote him, I think, during 1883, 1884, and 1885, and I think in 1886 he spoke the same way.

85 Q. When was the first conversation you had with him in regard to the matter you have just mentioned after the 19th
636 of October, 1882?

A. That I can't exactly place, Mr. Parsons. I might refer to letters that I may or may not have. I do not know anything now to fix the date; but I remember of talking to him.

86 Q. Did you have any conversation with the plaintiff concerning his selling out to your brother after the time the mine began to ship ore or about that time?

A. About selling out? I think I did. State that question again.

87 Q. Did you have any conversation with Bowman concerning the condition of the mine and his selling his interest in it to your brother about the time when they began shipping ore from the Col. Sellers mine?

A. I do not remember anything about that; I may have. I know I had a number of conversations with Mr. Bowman about the improved prospects of the property, and he always expressed himself as more than satisfied with the deal and the manner in which he had been treated.

88 Q. Did you ever have any conversation with the plaintiff in the winter, in the spring of 1883, or at any time about the shipment of ore from the mine and what the mine was producing?

A. I have no recollection of that conversation, that particular conversation; no, sir.

89 Q. You may state whether or not the plaintiff ever loaned you any money at any time.

A. He never loaned me a dollar.

90 Q. Did you ever give him your note for any given amount—any other note than the note of the 25th of March, 1882?

A. I never did. I have loaned Mr. Bowman some sums, temporary loans—$5.00, $3.00, fifty cents—and I suppose he paid me back.

91 Q. I now call your attention to the question*ed* numbered 81 of the plaintiff's direct examination, which reads as follows: "The statement of your deed that the consideration was $10,000 was not a fact, was it? A. Oh, no," and also to question and answer 82,
637 direct examination, "That was merely a formal statement?

A. Oh, yes; James Patrick stated to me in our conversation that it would be better for their interests hereafter to have it appear that something was paid for it, and, of course, it was immaterial to me to have it put that way." I will ask you if any such statement was made to you or by you at the time of executing the deed to your brother.

A. No, sir; there was not.

92 Q. State whether or not during the conversation with T. W. McManus about a week or ten days or possibly more prior to October 27th, 1882, in which you stated that you were going to get Bowman's interest, and whether or not in any such conversation you represented that you had obtained Bowman's interest or was going to obtain it; whether you *may* any such statement as that to McManus.

A. I had no conversation at that date; no, sir.

93 Q. Where were you then?

A. I do not think I was in St. Louis. I may have been, but I do not think I was.

94 Q. Did you say to McManus at the time mentioned or at any time that you were going to get Bowman's interest, and did he say in any such conversation, "Bowman is too smart a man, and you can't get his interest if it is worth what you say it is," and did you then say in reply to that statement, "I have got a way of doing such things"?

A. I had no such conversation and did not make such a statement, nor did he make such a statement to me. I had a conversation with him on the 27th in regard to a bet.

95 Q. Was there anything in substance like the statements that I have quoted?

A. Nothing like that nor approaching it; nothing of that substance.

96 Q. Did you at any time make any bet with T. W. McManus concerning the output of the Col. Sellers mine?

A. I did, on the 27th, as I recollect now.

97 Q. On October, 1882?

A. Yes, sir.

638 98 Q. What was the substance of that?

A. The substance of that was that Thomas W. McManus, then my brother-in-law, and was constantly in my presence and in the presence of my wife, questioning my brother's ability as a

miner. He had talked so annoying that evening that my wife said to me (interrupted)——

99 Q. You cannot state what your wife said unless in the presence of McManus and part of this conversation; was McManus present?

A. I do not think he was; anyhow my wife urged me when he broached the matter again to take him up and give him what is usually called a setting down on the matter, and that day he asked me about how much my brother had invested in the Col. Sellers and I told him I thought about $8,000.00, although I was not sure about that. "Well," he says, "he will never see it again, he will never see it again; it is like throwing money into the sea;" and I said, "Ward, I am not a betting man, I don't often make bets"—I do not know as I ever made a bet before that—"but Fanny here will want a new dress some time soon, and I will make you a bet of a $75.00 silk-dress pattern for her some time between now and this time next year, my brother will have taken out or realized out of the Sellers mine the sum of $8,000.00 or whatever amount he has now put in." He said he would take up that bet because he knew lightning never struck twice in the same place, and it was rather a familiar expression with him, and he said he would take the bet. The result was that I went up to my room and in my wife's presence I wrote out a bet, a document which I handed to him after executing and, of course, signed it myself before handing it to him, and he said that he would not take it on that basis, as my brother might sell the mine and get the money out in that way. My wife then said that that was not the understanding; that the money must be realized from the mine, and, urged by my wife, I
639 made a new contract, in which I wrote out a new contract in which I agreed to let the bet stand on the basis of that amount being realized from the sale of the ore, and we signed it. He took a copy and I took a copy; I think I gave my copy to my wife and he kept his copy.

100 Q. Is that all there was of that bet?

A. No, sir; that was in October, 1882; I think the 27th of October, 1882, and I came back along about Christmas of 1883 from Tennessee, and found shortly after that, I think along about the 1st of January, the first dividend was received of my brother, and he also sent me $4,000.00 to pay Mr. McManus what he loaned. I think that was the time he sent it to me, and I asked my wife is she had ever been paid the money on the bet, and she said no.

101 Q. Don't say anything about your wife; that is not competent testimony.

A. I did not say anything to Mr. McManus about the bet because I thought he would say something to me, and one evening he came into our room about eleven o'clock and stated he ought to be paid that money that I had lost the bet, and I told him that I was very positive the other way, and I was very much surprised that he had not tendered me the money previous to that, and he then said, "Here is an affidavit which I wish you would send to your brother, and if he signs it," he said, "I have been informed that I had won

the bet and that you lost too, but if your brother signs this I will pay the money." I took the paper and looked at it and I found written on the margin, "This is the "—it was all written in Mr. McManus's handwriting—"making a false oath is perjury; penalty, imprisonment in the penitentiary," and I was somewhat surprised at seeing this, and I asked him if he expected me to send that, and he said, "Certainly," and I told him I would take the paper or a copy of it, and I did so, and I was prevented from sending the original by my wife; in fact, I didn't intend sending the original anyhow, and I sent
640 on the copy, and in about ten days I received it back from my brother, duly sworn to, and I presented it to Ward McManus and he said it was a trick, and I asked him what trick it was and he said, "You didn't send the paper I had prepared," and I said I did, and I said, "Did you expect me to send a paper of that kind to my brother or any gentleman?" and he said, "Certainly," and I used some strong language and I said, "I want my money," and we made a very spirited demand, upon which he never acceded to; and afterwards, at my own option, I went in and gave Mr. McManus my check for $75.00 and told him that as we were members of the same family, I having married his sister, that I wanted no controversy about the matter, and that, although I considered that I won the bet and had documentary proof of the same and my wife agreed with me in the same matter (interrupted)——

102 Q. He never paid the bet?

A. He never paid the bet.

103 Q. Did you pay it to him?

A. I tendered him my check and he took the check and my wife got the check from him and handed it to me.

104 Q. That was all there was about the bet?

A. Yes, sir.

105 Q. Did you ever say to Mr. McManus that you were going to get around Bowman, and that you had a better way of doing such things, meaning of getting his interest from him, or did you ever intimate to him that you would resort to any trick or artifice of any kind for the purpose of getting him to convey his interest to you or your brother?

A. I never did.

106 Q. In your conversation with the plaintiff Bowman on the 23d of June, 1882, of which you have testified, was anything said by him as to his future address, post-office address?

A. Yes; he said that he was going up to Wisconsin and that his address would be Bayfield, Wisconsin.

107 Q. Was anything said——

641 A. He told me he told my brother the same.

108 Q. Was anything further said about that?

A. There was nothing more than I now recollect.

109 Q. Was anything said about his provision for future payments on his share of the expenses of working the mine?

A. He said that he had given my brother that address for the purpose of enabling him to communicate with him as to payments when it became due.

Cross-examination by E. McGinnis, Esq.:

X 1 Q. Were you not present and heard—did you not hear your brother's examination given in the last few days?

A. I have heard portions of it. I hav'n't heard all of it.

X 2 Q. Were you not here the entire time?

A. I was here, I suppose, a majority of the time; yes.

X 3 Q. In that three days were you absent twenty minutes?

A. Yes; I am positive of that.

X 4 Q. How much more?

A. Of that I am not positive.

X 5 Q. Was it as much as an hour?

A. More than an hour.

X 6 Q. Was it two hours?

A. It may have been. I went up to the house on one or two occasions. I went to the Sellers mine and went to the bank.

X 7 Q. While the depositions were going on?

A. Yes.

(Mr. Parsons:)

X 8 Q. Do you mean to the Sellers mine or to the office?

A. To the Sellers office.

X 9 Q. That is right close by?

A. About two squares off.

X 10 Q. You stated that you were in St. Louis on the 19th of June, 1882, and June 25th, 1882. Where was your residence then?

A. I considered my residence was then in Tennessee.

X 11 Q. What point in Tennessee?

A. Bradley county.

X 12 Q. What town?

642 A. Cleveland; near Cleveland, at the quarry; about eleven miles, I think. I was living at the quarry—that is, if I am not mistaken.

X 13 Q. Where were you living in July and August? Were you in St. Louis or outside of St. Louis?

A. My impression is that I was at St. Louis.

X 14 Q. Part of the time?

A. Part of the time. Of that I will not be positive.

X 15 Q. How soon after June 25th, 1882, the date of that note, before you left to go to your home at Cleveland, Tennessee?

A. Well, I do not know whether I went down that fall or not.

X 16 Q. That would be summer. How soon after June 25th, 1882, that you were in St. Louis, in Bowman's office, that you started home to Tennessee?

A. I think I started in a week or so after that, if I started at all. My impression is that I did start.

X 17 Q. How long before you came back to St. Louis, if you did start? How long did you remain at home that time?

A. I got in about Christmas time.

X 18 Q. Now, you were back again in October.

A. I was back again in October, but I may have stayed there and

may not. I do not know. There was one fall that I remember of staying pretty near all fall.

X 19 Q. I am asking you about after June 25th, 1882. How soon was it that you left for Cleveland, Tennessee? Was it all or a week or so after that?

A. How soon after June 25th?

X 20 Q. Yes. Did you go within June?

A. Well, I could not say about that. I can refresh my memory about that and find out.

X 21 Q. If you did not go, how long did you stay?

A. I do not know. I may have been there continuously. I could not state.

X 22 Q. If you went, did you stay some time, or what?

A. My impression is that I left shortly after, although I do
643 not know sure about the 25th of June.

X 23 Q. How long were you absent from St. Louis before you returned when you were in St. Louis again?

A. I was in St. Louis the 29th of October.

X 24 Q. Prior to that?

A. After that.

X 25 Q. Were you there between June 25th, 1882, between the date of your leaving in June and the 19th of October?

A. I was there for some time after the 25th of June; how long I do not know, but I may have stayed continuously until the 25th of October; there was one fall, June, 1882, 1883, or 1884, that I was there nearly all fall.

X 25 Q. How long does it take to go from St. Louis to Cleveland, your home?

A. I think it takes thirty-six or forty hours; something like that.

X 26 Q. Now, you say in your conversations with Bowman at the time that note was signed you and he talked over the fact that it was your part of the assessment on the Col. Sellers according to that contract you made with him on the 25th of March, 1882?

A. Yes, sir.

X 27 Q. You also talked with him in regard to the Livezey matter?

A. He mentioned the Livezey matter.

X 28 Q. Why would he talk with you on the day of signing that note about the Livezey matter?

A. I do not know; he mentioned the fact of having met Mr. Wilson there, of having seen him; he knew something of him before he went out to Leadville from St. Louis.

X 29 Q. Why would he bring up all these things in connection with signing that note?

A. My recollection is that he spoke of the peculiar hardship he had at that time in raising money; he was in a number of schemes
at that time; he was connected with a railroad scheme and
644 was taking a great deal of money; he was also afraid of the jumpers—he expressed that a number of times.

X 30 Q. At the time of this conversation he spoke of the jumpers?

A. He spoke of that; he spoke of the litigation.

X 31 Q. Don't you know as a matter of fact that you left the city of St. Louis on the evening of June 19th, 1882?

A. I do not know.

X 32 Q. And that all the statements that you have made in regard to that note having been signed on the 25th of June, 1882, and pretended conversation with Bowman are untrue?

A. I do not know it; what I said I stated to the best of my recollection.

X 33 Q. I now show you a telegram dated Union depot, St. Louis, Mo., June 19th, 1882, addressed to Wm. Patrick, Cleveland: "Just getting aboard train will stop in Nashville arrive Thursday James M. Patrick," and ask you if you sent that telegram.

A. Yes, sir; I believe I did if you have it; I do not know; I remember very distinctly again, for this calls my attention to a certain thing: That that evening or that day, about that day, I borrowed $40.00 on my watch to take me down there, but I do not think I got on the train at all; I think that I didn't meet the parties there that I expected to get the money from and didn't get off.

X 34 Q. Will you swear that you didn't leave St. Louis on the evening of June 19th, 1882, as you stated in this telegram?

A. I will not swear anything about it; my impression is as I swore before, that what I swore was correct.

X 35 Q. Will you swear that you didn't leave St. Louis on the evening of June 19th, 1882?

A. Let me see the telegram. (Witness is handed telegram.) I do not know anything about this telegram. Yes; here is the name of Thomas McManus on the back of the telegram and a lot of figures.

645 (Mr. PARSONS:) (Examines telegram.) This don't show that it is an original telegram.

(Mr. MCGINNIS:)

X 36 Q. Will you swear now that you didn't leave on June 19th, 1882, and leave St. Louis for Cleveland?

A. I will now swear either way; I will not swear that I did not. My impression was that I stayed there until the 25th, and I still think so, but I may be mistaken.

X 37 Q. You say you tried to borrow some money to pay your way?

A. I think that was the time I borrowed $40.00 on my watch to take me from St. Louis south.

X 38 Q. Did you get the $40.00?

A. I got the $40.00, but I do not think I got it in time for the train; that is my impression. I borrowed it from a man with whom Ward McManus was interested as a pawn broker.

X 39 Q. This says, "I am getting aboard train at St. Louis." What were you doing getting aboard a train if you hadn't the money?

A. I may have and may not.

X 40 Q. Don't you see from this telegram that you left St. Louis on June 19th, 1882, and that you were not in St. Louis at all on June 25th and that you never saw Bowman again until September, 1882?

A. I do not know about that.

X 41 Q. Don't you know that you never saw Bowman after the 19th of June, 1882, until September, 1882?

A. The only explanation of that was that I must have had that settlement on the 19th; that I can give, and if I left on that date we made the settlement on the 19th and the note was dated the 25th.

X 42 Q. Don't you know that you never gave this note at all until you came back—until Bowman came back in September?

A. I do not recollect anything of that kind.

X 43 Q. Then your statements when this conversation with Bowman occurred, are they true, of June 25th?

646 A. It was either June 25th or June 19th, one of the two; it was either June 19th or June 25th.

X 44 Q. Now, don't you know that that note of June 25th, 1882, was given in September, 1882, and you and Bowman met in St. Louis afterwards when he returned from the North?

A. I do not know that.

X 45 Q. Will you swear it was not?

A. I do not know that.

X 46 Q. Why would the note be dated June 25th, 1882, if it was written and the transaction was completed on June 19th, 1882; that was the date Bowman made his payment and settlement?

A. I suppose it was made to make it correspond with the date of March 25th. Between the 19th and 25th there is only six days difference. It is very easy for a person to make a mistake as to dates.

X 47 Q. That is, a person in making a note on June 19th might make it the 26th?

A. It is a very common practice to date the notes ahead or date them back.

X 48 Q. But you state you went to Bowman's office after your brother had left, and had a conversation with him at the time this note was made?

A. I say about that time.

X 49 Q. You also stated that after your brother had left that you went to Mr. Bowman's office and you had a conversation with him, and he there told you that his address would be Bayfield, Wisconsin, and that you so told your brother?

A. He told me that at that time, about the 19th or 25th.

X 50 Q. Your brother was there on the 19th?

A. Yes; so was I.

X 51 Q. Then why would you go back and have a separate engagement with Bowman that same day?

A. We may have had it there at the same time; I do not know. I do not know. It was either the 19th or 25th that that note was made.

647 X 52 Q. Then all this conversation you have been swearing about between you and Bowman occurred after Bowman left the city?

A. They occurred between the 19th and 25th; it is very easy for a man in four or five years to be mistaken four or five days.

X 53 Q. You say you saw Bowman several times in September?

A. I do not know as I said that.

X 54 Q. You did say September, 1882; did you say it or not?

A. I do not believe I did. I may have said it, but I do not recollect now.

X 55 Q. When did you first see him after his return in September, 1882?

A. I certainly saw him on the 19th of October.

X 56 Q. Did you see him prior to that?

A. Yes; possibly.

X 57 Q. Didn't you state in your direct examination that you spoke to him and told him that the mine was getting along so as to induce him to make his payments?

A. I spoke to him about that before the 19th day of June.

X 58 Q. But there was a settlement made on the 19th of June and everything was settled up?

A. It was before the 19th of June.

X 59 Q. You did see Bowman on the 19th of October, 1882, in his office in St. Louis?

A. Yes, sir.

X 60 Q. Had you obtained any knowledge or information prior to that time of the discovery of ore in the Col. Sellers shaft?

A. Nothing definite.

X 61 Q. What was not definite?

A. I cannot recollect now that I heard anything that was peculiarly apropo to the matter; I may have heard considerable; I do not know.

X 62 Q. Tell us what you have heard?

A. I do not know; I have no recollection particularly of anything.

X 63 Q. Don't you know that you were informed in August,
648 1882, as to the discovery of ore in the Col. Sellers shaft and were requested to keep it from coming to Mr. Bowman's ears?

Counsel for defendants objects to the question and answer called for for the reason that no foundation has been laid for it. It does not appear how he was informed nor who requested him to keep it quiet or keep it from Bowman; the time and place has not been fixed.

(Mr. PARSONS:) Do not answer the question unless the time and place has been fixed.

X 64 Q. Do you refuse to answer the question?

Counsel for defendants instructs the witness not to answer the question propounded for the reason that it is an attempt to intro-

duce testimony that has been heretofore excluded from the records in this case, and unless the time and place and circumstances are called to the attention of the witness counsel for defendants instructs the witness not to answer the question.

X 65 Q. I will put the question again. Had you at any time prior to October 19th, 1882, received from any source any information as to the discovery of ore in the Col. Sellers shaft and asking you not to let it get to Bowman's ears, excluding the letters that have been stricken from the evidence in this case?

Question objected to for the reason that the letters excluded from the record in this case have not been called to the attention of the witness so that he is able to determine what was excluded and what was not, and that therefore the question is indefinite, and for the further reason that it does not indentify in what manner the witness received the information.

X 66 Q. The letters that were excluded from the case were three in number; one was a letter purporting to have been writ-
649 ten by Anne to you, the wife of your brother William, to yourself, and two of them were letters written by yourself to your wife, all in August, 1882. Excluding those letters, didn't you have prior to October 19th, 1882, any information from any source of the discovery of ore in the Col. Sellers shaft with a request by anybody that you keep that fact from coming to Bowman's knowledge?

Counsel for defendants objects to the question for the reason that the information called for may have been a privileged communication to the witness, and it may have been, for aught that appears from the question, from a source which would not be binding upon the witness or his codefendant in this suit. Counsel further instructs the witness that if his attention is directed to any time or place or source of information independent of the letters excluded from the record he is at liberty to answer them.

X 67 Q. Answer or not, as you please. Do you refuse to answer that question?

(Mr. PARSONS:) You can answer the question if you received the information independent of the letters excluded from the record.

(The last foregoing question was repeated.)

(Mr. PARSONS:) Counsel for defendants withdraws his instructions to the witness and instructs him to answer the question.

A. I may and I may have not; I have no recollection now as to the occurrence.

X 68 Q. Will you swear that you did not?

A. I will not swear that I did not; I have answered the question, I think.

Question objected to for the reason that the witness has stated that he has no recollection upon the subject.

650 X 69 Q. I now show you a letter dated Asbury P. O., Knoxville, Tennessee, August 17th, 1882, addressed My dear son and signed Mother, and ask you if you know in whose handwriting that letter is.

A. (Examines letter.) That is in the handwriting of E. J. Patrick, I think—I will not be positive—signed Mother. I think that is in Mrs. Patrick's handwriting, my mother's.

X 70 Q. Is not that the handwriting of your mother?

A. I think it is.

X 71 Q. Did you receive that letter?

A. I do not know; I suppose I did; I may have.

X 72 Q. I will ask you what you have to say, then.

A. I think this is one of the letters that have been thrown out.

X 73 Q. It has not; it has never been offered before.

A. I do not know whether I ever received that letter.

X 74 Q. Will you swear that you did not?

A. I will not swear that I did not; I will not swear that I did; I will not swear when I received it, either.

(Mr. McGinnis reads letter:) "On last Tuesday Eddie & self went to K. to bring out Mrs. Dickinson. We stopped to see Anne of course. Found Mrs. Hale feeling better but very weak. Anne was jubilant over receiving a letter received the day before from Willie. He wrote her that they had found mineral in the Sellers (but conservative ever) though it was only a small pocket in the porphyry. While we were there the evening brought another letter from W. which E. carried over to A. in order that we might have the very latest news before going home. In this letter he said that a clearly defined mineral vein extended entirely across the shaft and he was more than pleased with the outlook of the mines." Did not you prior to October 19th, 1882, receive that letter containing that information?

651 Counsel for defendants objects to the question and to the presentation of the letter referred to to the witness as irrelevant and immaterial and for the reason that the defendants or either of them are not bound by any communication written by the party purporting to have written that letter, said party not being a party to this suit, and it not appearing that she was authorized to write such a letter, and it not appearing that she was the agent of the defendants or either of them at the time said letter was written.

(Mr. Parsons:) What is the date of that letter?

(Mr. McGinnis:) August 17th, 1882.

(The last foregoing question was repeated.)

A. I will not say that I did.

X 75 Q. Will you say that you did not?

A. I will not say that I did not. If you will allow me to explain that, I say that I will do so.

X 76 Q. You can say anything you please.

A. Because I remember I was traveling around those years a good

deal and often did not get letters until as late as six months after they were written.

X 77 Q. So you think on that day you did not have that letter?

A. I did not say that I did not. I may and may not have had that letter.

X 78 Q. Did you communicate that information to Bowman on that day?

A. I have stated what I have stated, that I do not think there was any conversation about the matter at all.

X 79 Q. You were jointly interested with Bowman in that very mine and he had given you an interest in it and assumed your payments for you at that very period?

A. He hadn't given me any interest at all.

X 80 Q. Didn't he let you in on an interest?

652 A. I paid for the interest. I gave the note that he considered good.

X 81 Q. But up to that time you were interested in that mine through him on the basis on which he was himself interested in it, and he was assuming your indebtedness and you hadn't paid a dollar up to that time?

A. I gave him my note; that was all he called for.

X 82 Q. You met him in his office that day and did not give him any information contained in that letter.

Objected to for the reason that it appears that before the day inquired about the plaintiff had executed and delivered a contract and had agreed to part with his interest in the Col. Sellers and Accident claims to the defendant William F. Patrick, and for the further reason that the defendant James M. Patrick was under no obligations to disclose any knowledge that he had in regard to the mine, as there was no negotiations between the witness and the plaintiff, Bowman, in regard to the disposition of his, Bowman's, interest in said mines to William F. Patrick.

X 83 Q. What is your answer to that question?

A. I will repeat what I said before, that I made no misrepresentation to Mr. Bowman at that time.

X 84 Q. Did you tell him at that time that a clearly defined vein had been discovered?

A. I may have told him so and may not.

X 85 Q. Do you think you did?

A. I do not know. I cannot say. I know very well I made no misrepresentations.

X 86 Q. What is your best impression?

A. Of what?

X 87 Q. That you did tell him—as to whether you told him or not.

A. My best impressions are that I certainly made no misrepresentations to him. I may have told him. I do not know

653 whether I did or not. What I am positive of is that there were no misrepresentations made to Mr. Bowman.

X 88 Q. But didn't you keep silent when you ought to have spoken?

The question is objected to, as the answer called for is a question of law to be determined by the court according to the relation of the parties at the time, *in* which the attention of the witness has been directed.

(The last foregoing question was repeated.)

A. I did not say that I kept silent.

X 89 Q. Did you speak?

A. I do not know; I may have. The only thing I am positive of, Mr. McGinnis, is that no misrepresentations were made to Mr. Bowman that day or at any day.

X 90 Q. A man, according to your idea, could not make any misrepresentation by keeping silent, could he?

Objected to as being argumentative, not calling for the statement of a fact, and for the further reason that the witness was under no obligation to disclose any knowledge he had in regard to the mine to the plaintiff at that date, for the reason that it does not appear that the witness was authorized to make any statement to the plaintiff concerning or affecting any negotiation existing between the plaintiff and William F. Patrick.

(The last foregoing question was repeated.)

A. I do not know what my conversation with him was at that time—what I could have stated.

X 91 Q. Now, Mr. Patrick, don't you know that you received that letter long prior to October 19th, 1882, containing that information, and you never breathed one word of it to Mr. Bowman?

Question objected to because the witness is not bound to disclose any information that he obtained by that letter, purporting
654 to be a communication from his mother to him, and it does not appear that the statements in said letter were made by any one authorized to make them, and, further, that it does not appear that the statements contained in said letter were true, and that it does not appear that the witness ever received said letter.

(The last foregoing question was repeated.)

A. I do not know that I ever received that letter; I do not know that I ever received it prior to that time, if I did receive it at all.

X 92 Q. Do you say that the statement contained in that letter is not true?

A. I have no means of knowing whether it is true or untrue.

Objected to as irrelevant and immaterial.

X 93 Q. Had you not also been requested not to communicate the knowledge of the discovery of ore to Mr. Bowman prior to October 19th, 1882?

Objected to for the reason that no time or place is fixed, and for the reason that the name of the person by whom such request was made, if any was made, is not given.

(The last foregoing question was repeated.)

A. I do not know whether I have or not.

X 94 Q. Do you say that you were not so requested?

A. I did not say.

X 95 Q. If a request of that kind was made to you in a matter of that kind, would it create such a slight impression on your mind that you could forget it?

A. I do not know; it might and it might not; I cannot remember at this time. I know I have been requested to do a great many things that I have forgotten to do, and I have been requested to do a great many things that I hav-n't forgotten.

655 X 96 Q. Then do you say that you are in doubt as to whether you were requested to keep quiet in regard to giving that knowledge to Mr. Bowman?

Objected to for the same reasons above stated.

A. If you could give some dates.

X 97 Q. Were not you in the month of August, 1882, requested not to communicate the fact of the discovery of ore to Mr. Bowman?

Objected to for the reason that the name of the person by whom such request is made is not given, the time or place fixed, and for the reason that it is an attempt on the part of counsel for the plaintiff to trap into the record indirectly what has already been excluded therefrom.

(Mr. McGinnis:) I will state that that is not true, and that the witness has been told by me, and I now repeat to him, that in none of my questions relating to this matter do I refer to the three letters excluded from the case, and I refer to other sources of information entirely.

(The last foregoing question was repeated.)

A. I may have and may not have. I do not know at this distant period. I cannot recollect anything of it.

X 98 Q. Were you at any time prior to October 19th, 1882, requested not to communicate the fact of the discovery of ore to Mr. Bowman?

A. Prior to what date?

X 99 Q. Prior to October 19th, 1882.

Objected to because the witness has already answered several times that he did not recollect any such request.

A. At this date I cannot recollect whether I was or not. I may have been and may not have been.

X 100 Q. What is your best impression?

656 A. My best impression of that is, as I have stated, that I have no means now of knowing it. If you can refresh my memory I probably can remember it.

X 101 Q. Do you still say on reflection that you have no recollection on that subject?

A. I still say on mature reflection that I cannot now recollect any particular time, place, or date.

X 102 Q. Leaving out the particular time, place, or date, but considering only the fact that you were requested not to disclose the discovery of ore, were you requested not to disclose to Bowman the discovery of ore? Leaving out the questions of dates, times, and places, were you at any time prior to October 19th, 1882, anywhere, in any way requested not to disclose to Mr. Bowman the fact that ore had been discovered in the Col. Sellers shaft?

Objected to for the reason that the witness has already answered the question repeatedly.

A. By any person?

X 103 Q. Yes.

A. I have no recollection, as I have stated before, in regard to the matter particularly. I may have been and may not have been.

X 104 Q. Did you know on the 19th of October, 1882, from any source whatever, excluding those letters that have been excluded from evidence, that there was ore discovered in the Col. Sellers shaft?

A. I can't recollect now whether I did or not.

X 105 Q. On the 27th of October, 1882, you were willing to make a bet with Ward McManus, as you have stated?

A. Yes, sir.

X 106 Q. That your brother on his interest would take out at least $8,000.00 in ore. What was the information that you then had that enabled you to make such a bet as that?

A. I do not think that I had any positive information except the mere faith in my brother's judgment and his ability to prose-
657 cute successfully mining enterprises.

X 107 Q. You did not know at that date that ore had already been discovered in the shaft?

A. I do not know that I did *no* that pay ore had been discovered in a body. I may have known and may not.

X 108 Q. You were with your brother in October, 1882. Did he conceal that fact from you then?

(Mr. PARSONS:) Conceal what fact?

X 109 Q. That ore had been previously discovered in the Col. Sellers shaft?

A. I think he made the remark to me that he had not been to the Col. Sellers mine for some time.

X 110 Q. So on October 19th, 1882, although you had seen your brother, you did not know that ore had been previously discovered in the shaft?

A. I will not say that I did or did not.

X 111 Q. And yet within a very short time afterwards, about nine days, you made a bet based on the fact that he would take out $8,000.00 within a year.

A. I made the bet on the fact that I knew that he (William) would not expend $8,000.00 on any mining claim or any such large

amount unless he saw some chance of getting it back in the future; that is why I made the bet.

X 112 Q. You had no knowledge up to that time that ore had previously been discovered in the Col. Sellers shaft?

A. I may and may not; my main reliance in making that bet was his conservativeness and his manner of conducting mining enterprises.

X 113 Q. Then you knew that he was such a good miner that, although no ore was discovered, he was able to find it in the Col. Sellers shaft?

A. I think you are putting questions in my mouth.

Question objected to because it misrepresents the statement of the witness as to what he based his bet upon and is argumentative
658 and does not call for the statement of a fact from the witness.

(Answer continued:) I think I made a statement to some parties at that time—at the time the bet was made—that I had no very positive information as to the status of the mine, but that I was willing to go $75.00 on my brother's judgment, and therefore I made the bet.

X 114 Q. So that it was based upon what would come out of the mine after that date or would be discovered rather than prior to what would be discovered up to that date?

A. I do not know that that was the case.

X 115 Q. What do you say? Were you making your bet on the belief that something had been found or that something would be found?

Objected to for the reason that it appears, by the bet itself that has already been introduced in evidence, that is related entirely to the future developments of the mine, extending through a period of one year, and was not based upon any present development in the mine, and for the further reason that the negotiations between the plaintiff and the defendant William F. Patrick had been ended and the transfer had been consummated at the time to which the witness's attention is directed.

(The last foregoing question was repeated.)

A. I was thinking more particularly of the future than of the present or the past.

X 116 Q. Do you say more particularly of the future? To what extent were you thinking of the future and to what extent of the past?

A. I cannot come down to mathematical deductions of the matter, what per cent. I based my belief on—the present or past—or how much per cent. I put on the future.

X 117 Q. Then will you swear that your best impression
659 was on the 7th of October, 1882, that no ore had been discovered in the Col. Sellers shaft?

A. I do not know what my impression was then; as to the then present status of the mine I could not say.

X 118 Q. You stated in your direct examination that you met Mr. Bowman along in the fall after that, in 1882 and probably in January or February of 1883, and spoke about the developments in the mine and what a successful matter it was, and that you remarked to him, "I am sorry for you that you sold your interest and I am glad that my brother bought it."

A. I think we had a conversation like that.

X 119 Q. What made you glad that your brother bought it and that Bowman parted with it at that time?

A. Because the prospects of the mine was improving and was somewhat better.

X 120 Q. Then you were keeping a run of the mine?

A. I do not know that I was; at that time I was considerably exercised about the the condition of my wife; she was about to be confined, and I paid more attention to family matters then than I did to business.

X 121 Q. If you were so sorry for Bowman, who let you into the mine and had assumed your obligations, why did not that same sorrow prompt you to tell him of this ore on October 19th, 1882, when you met him, of which your mother had written you?

Objected to for the reason that the witness was under no obligations at that time to disclose the correspondence between himself and mother, and for the further reason the *the* witness was carrying on no negotiations with the plaintiff for the transfer of his interest at that time, and also because it does not appear that the information contained in the letter referred to was ever brought to the knowledge of the witness, and for the further reason that the
660 answer called for is immaterial, irrelevant, and incompetent.

(The last foregoing question was repeated.)

A. I have never denied; I have never said that I did not tell Mr. Bowman. I think I have repeatedly stated that I might have told Mr. Bowman. I did say, however, that I was very positive that neither on the 19th of October, 1882, or at any other time or date was any misrepresentation made to Mr. Bowman.

X 122 Q. I now show you a letter written, dated Knoxville, Tennessee, March 24th, 1882, addressed Dear son and signed "Your father, W. Patrick," and ask you if you received that letter. Do you know the handwriting of that letter?

Objected to as immaterial, irrelevant, and incompetent.

A. This is written by William Patrick, or purports to be.

X 123 Q. Whose handwriting is that, if you know?

A. I looks like William Patrick's.

X 124 Q. What William Patrick?

A. My father.

X 125 Q. I will ask you if you received that letter.

Objected to as immaterial and incompetent.

A. I could tell you better if I had the envelope.

X 126 Q. Did you receive that letter?

A. I cannot say; probably I did, probably I did not; as to what date I received it I do not know; I suppose I may have received this; at what date I do not know.

X 127 Q. I read to you in that letter the following: "Anne was up to see us on Tuesday. She just got a letter from Will. He writes her the mine is all right. He is now going through a body of mineral that pays, and hopes to strike carbonates soon and has resolved not to sell but hold onto the mine. You must not write anything to St. Louis about it as Wm. has not got Bowman's deed yet, only has a written promise for it. If you have written to any per-
661 son, caution them to say nothing about it." Will you swear that you didn't prior to October 19th, 1882, get that letter containing just what I have read you?

The question and quotations from the letter objected to upon the ground that they are incompetent as testimony in this case, are irrelevant, and immaterial.

A. I won't swear that I didn't receive that; I may have received it prior to the 19th of October and may not have.

X 128 Q. What is your best impression?

A. I could not give my impressions about that now. I think that letter was published in the newspapers, or portions of it, and then it took me by surprise; I was surprised that there was a letter of that kind out.

X 129 Q. It was the fact that it was out surprised you, was it not?

A. I do not know anything about the letter, but may have received it.

X 130 Q. And you are asked about it now.

A. I suppose I received it, but when I received it I do not know.

X 131 Q. Do you mean to say that a letter written to you on the 24th day of August, 1882, would not reach you until the 19th of October, 1882?

A. I will say this, which I have already stated, that I have had letters from my father and mother and other parties in Tennessee, St. Louis, and Leadville, which have been out as much as six months or more before I received them.

X 132 Q. Then, if you did get this letter prior to October 19th, 1882, when you met Mr. Bowman you told him, did you not, that ore had been discovered in the Col. Sellers shaft, and that you were requested not to tell him anything about it?

Objected to as immaterial, irrelevant, and incompetent.

A. I don't think that I would have told Mr. Bowman that kind of a statement or remark, I am sure.

X 133 Q. Why so?

662 A. Because I would be very foolish; that would be a very foolish statement to make.

X 134 Q. In what respect would it have been foolish?

A. It would be a statement that a child might make; nobody else.

X 135 Q. That is, you would look upon it as foolish to communi-

cate such a thing, but how would you regard it in regard to dishonesty?

Objected to as immaterial and irrelevant.

A. I do not know that the question of honesty would have anything to do with it. It is a matter of business policy.

X 136 Q. Then you have been admitted into the ownership of that property by Mr. Bowman upon the same basis as himself, and, he having assumed your obligations to and you not having up to that date paid one dollar, you looked upon it as a matter of policy to keep from him the fact of the discovery of ore?

Objected to for the reason that the question assumes, what is not true, that the witness had been let into the contract by Bowman, and that Bowman had assumed his obligations, and that the witness had paid nothing up to that date, whereas the fact shows that the proposition to let the witness into the contract came from Bowman himself because he could not afford to carry the contract, and for the further reason that it appears in evidence that the witness did execute and deliver a note for the amount that had been charged against the interest assigned to him, which note bore ten per cent. interest, and was accepted by the plaintiff in settlement of the witness's proportionate share of the expenses up to that time.

(The last foregoing question was repeated.)

A. It is not true that I was admitted by Bowman, as you have stated, without consideration. I paid Mr. Bowman all he asked and relieved him of an honest responsibility by the delivery of
663 my note to him, and I considered that I had rendered him full and entire satisfaction therefor.

X 137 Q. You have not answered my question as to considering it a matter of policy to keep from him the discovery of ore. I wish an answer to that part of the question.

A. I did not say that I didn't, nor have I stated that I did keep it from him.

X 138 Q. Didn't you consider it a few moments ago; you consider it policy to keep the contents of that letter from him?

A. I do not know as I said that; I said that I looked upon that proposition as you put it—as a policy proposition.

X 139 Q. You left entirely out of the question its honesty, and considered only whether it was policy or illegal?

A. No, sir; I did not leave out of it the question of honesty.

X 140 Q. Then didn't you communicate to Mr. Bowman prior to October 19th, 1882, the fact that ore had been discovered in August, 1882?

A. If I had received that letter prior to October 19th, 1882, the possibilities are that I would have obeyed the instructions of the letter; the possibilities are; I do not remember what I did.

X 141 Q. Then you admit that the possibilities are that you knew of the fact of the discovery before that time, and that you were keeping the information from Mr. Bowman?

A. I did not say that; my letters have been hawked all over the

country and have been stolen from safe deposits and from my desks—my private papers—so that I could not say anything as to that matter. Every letter which you have were stolen from me by some of the McManus family or some one connected with them.

X 142 Q. You say, then, that the possibilities are that you didn't communicate that to Mr. Bowman?

A. I say that if I received that letter, just as I said before, prior to the 19th of October, the possibilities are that I would obey
664 the instructions of the letter.

Whereupon, at the hour of five o'clock p. m., the taking of testimony was continued until November 24th, A. D. 1887, at ten o'clock a. m.

November 24th, 1887, at ten o'clock a. m., the taking of testimony was continued.

JAMES M. PATRICK, cross-examination of, continued by E. McGINNIS, Esq.:

X 143 Q. I now show you a letter dated Leadville, July 31st, 1882, addressed Dear brother and signed W. F. P., and ask you in whose handwriting that letter is.

Question objected to for the reason that the letter referred to has heretofore been called for by the defendants and their notice served upon the plaintiff and his counsel that they might examine and inspect the same.

A. This letter, I suppose, was written by my brother, William F. Patrick; it was signed by W. F. P.

X 144 Q. It was signed by William F. Patrick?

A. Yes; it seems to be in his handwriting, although I can only identify it by the similarity of his handwriting—that is all—in comparison with the letters I have; after having passed through the hands it has, and being stolen as my letters have, I would not be satisfied of anything I saw in it.

X 145 Q. In this letter of July 31st, 1882, which I have just shown you and which you have read, are contained the words: "The shaft in the Col. S. is now about 215 feet and is looking more encouraging." When did you receive that letter?

A. That I could not say, Mr. McGinnis, when I did receive that letter, nor can I say that I ever received it.

X 146 Q. Is not your brother and codefendant, William
665 F. Patrick, now in the room?

A. Yes, sir.

(Mr. McGINNIS:) These depositions are being taken in short-hand by the stenographer and have not yet been written out and signed, and I will now state to the defendant William F. Patrick and his counsel that he may be recalled and examined in regard to that letter, if they so desire, that letter not having been offered when he was on the stand. The opportunity is hereby given Mr. William F. Patrick to be recalled and examined concerning the letter, if he wishes to be so examined.

Redirect examination by C. C. PARSONS, Esq.:

1 Q. You were asked in your cross-examination concerning a certain telegram dated June 19th, 1882, which purports to have been sent by you to your father, in Cleveland, Tennessee.

A. I will not be positive. I would like to see the telegram.

(Mr. MCGINNIS:) It is to W. M. Patrick.

(Mr. PARSONS:) Let me see the telegram.

(Mr. Parsons hands telegram to witness.)

A. It says, "W. M. Patrick." I do not know who that may be. It may be Warner Patrick and it may be William. I do not know who that may be. There seems to be some erasure about the word "June"—some scratching. It possibly may have been originally January, 1882, and then changed.

2 Q. Have you any recollection—that is, as a matter of memory—of sending this telegram?

A. I have no recollection of it. I will say here I think I can confirm it by my friends that I never signed my name "James M. Patrick" to a letter or telegram. My invariable rule is to sign "Jas. M."

3 Q. That is the way this is; this is "Jas."

A. I may have forgotten it.

4 Q. Have you any other letters, memorandum, telegrams, or documents which would enable you to ascertain definitely
666 whether this telegram was sent by you at the date which it bears or which would enable you to state definitely whether you left St. Louis as indicated in this telegram?

A. I have other letters, documents, telegrams, probably contracts, which were stolen from me at various times by parties connected with the McManus family and Mr. Price, and there are also letters and other documents which Mr. Price has admitted to have stolen from me from my private desk in a warehouse; Mr. Price and Mr. McManus was present and Mr. Price admitted that he advised McManus to take these telegrams out of my private desk in March, 1887, some time after Mr. Ward McManus had been deposed from the administratorship of Fannie C. Patrick; these papers were produced, some of them, in the hearing upon the *habeas corpus* case and during the time of the taking of testimony in the city of St. Louis during the last summer. I have reason to believe that the attorney for the plaintiff now has portions, parts or wholes, of such papers, and if those were called to my attention, presented to me, I might be able to refresh my memory to a considerable extent as to where I was on the 19th of June or the 25th of June.

(Mr. MCGINNIS): I will state now that I hav'n't any papers, as I never heard of any others in relation to that question.

Counsel for defendants moves to strike out the statement of the attorney for plaintiff as not being any testimony.

(Mr. PARSONS continues:)

5 Q. Do you say that if you were able to get possession of all the papers and documents that originally belonged to you and which you state have been surruptitiously taken from your possession that you believe that you could fix the date of your departure from St. Louis more definitely?

A. I certainly do; and I also believe that these papers were stolen in March, 1887, for the purpose of preventing me from making
667 an adequate defense in this suit, and that they are now kept back by interested parties for that same purpose.

6 Q. Is the Thomas Ward McManus that you spoke of as having abstracted or stolen your private papers, letters, and documents the same Thomas Ward McManus who has been examined as a witness and whose deposition has been taken on behalf of the plaintiff in this suit?

A. Yes, sir; he is also the same party who abducted my child—was a party to the abduction of my child from the State of Colorado—and also a party to the abduction of my child from the State of Missouri and left it in the State of Iowa.

7 Q. Do you say that he admitted having surruptitiously taken your papers, and that his counsel admitted that he had advised such a course?

A. He was present and advised such a course.

8 Q. Do you mean that these admissions were made in the trial of the *habeas corpus* case in which you sought to recover possession of your child?

A. I mean to say that the proprietor of the warehouse—I think a Mr. Burns; I will not be positive of the name—situate on Olive street between Jefferson avenue and Beaumont St., in the city of St. Louis, was put on the stand and he testified to the fact that in March of 1887 Thomas Ward McManus, accompanied by his attorney, Mr. Price, came to the warehouse and broke open my desk and took out the papers and afterwards used them in the *habeas corpus* case—used portions of them. Mr. Price, when this matter was proven, admitted it to the counsel and to my counsel at that time. I think it is a matter of record in the case that he had been present and advised the proceedings at that time done. My attorney, Mr. Lane, of Iowa, notified him of the fact that he had committed a criminal act and that he would be held liable under the statutes of the State of Missouri—both he and Mr. McManus. He said he would
668 take the responsibility.

9 Q. Have you seen this telegram that is presented to you before your examination to-day?

A. No, sir; I wish to state further that during the proceedings of the *habeas corpus* case letters were presented, one of which I now particularly remember; I think it was written to a party in Knoxville; was signed by my name. I found it to be a mere —. I denounced it as a forgery and I had never written any such letter.

10 Q. I am asking you about this telegram.

A. Yes, sir; I am therefore convinced that there is a very great

possibility that there are other fraudulent papers prepared and wrote, to be used at any time to suit the parties' interest.

11 Q. Have you the means of ascertaining your exact whereabouts on the 19th of June, 1882, more than five years ago, by the date of the note of June 25th, 1882, and this telegram that was presented to you for the first time in your examination to-day?

A. No, sir; I have no means of ascertaining that fact or of being able to state where I was at that date; I did hope at one time after this case had been started, this suit had been started, to be able to produce letters of my wife written to me or me to my wife, but I learned during the progress of the *habeas corpus* case that such had been destroyed. Admissions were made to that effect by the McManus family.

12 Q. This telegram purports to be a communication from you to William Patrick or to your father, and is dated St. Louis, Mo., June 19th, 1882, and addressed to him, to your father at Cleveland, Tennessee, and appears to be a private communication from you to your father; do you know how this telegram, as well as letters that have been produced here and which appear to be private communications between your brother and you and your mother,
669 father, and yourself—can you state how they got into the possession of counsel for the plaintiff?

A. I can by being slightly prolix.

13 Q. You can state what you know about it.

A. My wife and child were abducted by the McManus family. My wife and child were abducted by the McManus family and co-conspirators from Cañon City in July, 1886—Cañon City, Colorado, in July, 1886. She died on the 9th day of October. Only some few days, some four or five days, after she was taken to St. Louis a bill of divorce was filed against me, and when my wife died I went on to institute proceedings for the child and found she had been secretly taken to Iowa. I there at that time and during the progress of the *habeas corpus* case which I brought in Davenport (Iowa) for the possession of the child learned that all of my private papers had been taken there from my private deposit box in the city of St. Louis, which was jointly in my name or my wife, or from my trunk in the city of Cañon City, Colorado, taken to the McManus residence in the city of St. Louis, or from my private desk stored in the warehouse on Olive street, as I have stated before. I wish to state here also that during the progress—one reason why I am not positive of this telegram, as to the genuineness of this telegram, is the fact that during the progress of the *habeas corpus* case in the city of Davenport, Iowa, the fact was developed that the very bill of divorce which had been filed against me was a fraudulent bill of divorce, and was so admitted by the attorneys on the other side; in other words, matters had been erased, as testified to by Cullen, United States commissioner, and acting, I think, at that time as notary—matters had been erased and other words to the extent of some two or three sentences had been substituted, the stamp had been effaced, and these matters were admitted to have been done by Mr. Price, the

attorney for Mr. McManus, and on learning of the fact Mr.
670 Lane, my attorney, again notified him that he had committed a criminal act and was liable under the criminal laws of the State of Missouri.

14 Q. I will ask you whether, if you had possession of all the letters, papers, and documents that originally belonged to you—whether you could gather from them such information as would inform you how to state accurately the day you left St. Louis for Tennessee.

A. I think that if I could get possession of papers that have been stolen from me and papers that are now in possession of Thomas Ward McManus or other members of the McManus family, Mr. Price, and their co-conspirators I think I should be able to fix almost any date within the last five years.

15 Q. You say that if the telegram referred to was sent by you at the date it purports to have been sent, and if you started to Nashville, Tennessee, as indicated by that telegram, on the 19th of June, 1882, that your settlement with Bowman must have been made on the 19th instead of the 25th?

A. If I left on the 19th, I may possibly only have gone as far as Cincinnati and returned. I know that I had customers in Cincinnati at that time to whom I was selling marble in quite considerable quantities, and I remember, what date I cannot now fix, that I did take a trip to Cincinnati to see and make a settlement with Mr. Martino for marble there and did return to the city of St. Louis, but what date I do not know. I remember that very distinctly. I also remember well—it is possible, then, again that that contract may have been made on the 25th of August.

16 Q. What contract?

A. The note having been signed by me to Mr. Bowman and the settlement made on the 25th.

17 Q. Might this settlement not have been on the 19th and the note dated on the 25th?

671 A. That is the more plausible view I take of the situation.

18 Q. In case you left St. Louis on the 19th?

A. Yes; because I know it has been the practice of a great many business men to date ahead or date back notes.

19 Q. Have you since your examination yesterday been enabled to state more definitely whether or not the contract of the 25th of March, 1882, which you made with the plaintiff and which contained an assignment of one-sixth interest in the contract of the 17th of February, 1882, to you by the plaintiff was made on that date?

A. Yes; I have more confirmatory proof, because I have consulted documents which at that time *which*, when I was on the stand before, I had forgotten about.

20 Q. What was it?

A. I consulted them since.

21 Q. What was the document?

A. A letter which I wrote to my brother on the 14th of April, 1882.

22 Q. What is in that letter which enables you to state that the contract was made prior to that date?

A. The statement that I had made a contract with Mr. Bowman for a one-sixth interest or one-twelfth interest, whatever it was.

23 Q. That is, you wrote your brother on the 14th of April, 1882, that you had obtained a one-sixth in the contract?

A. One-sixth in the contract; that is my impression, and I also stated that I would send it to my brother if he desired it, but I do not know whether my brother ever asked me to send it.

24 Q. Have you since your cross-examination been enabled to fix more definitely the time when you were in St. Louis in the fall of 1882—in September, 1882? Refer to your check book.

A. I think I can locate that matter. I think I fixed the date some time about the 25th or latter part of September that I was there by referring to my check book. I think that is my recollection. I could refer to the check book when I was there continuously.

672 25 Q. You had better refer to your check book and see what time in September you were in St. Louis.

A. I remember of borrowing $4,000.00, as you call my attention to the check book—I remember of borrowing $4,000.00 that year and placing it in this bank and drawing against it and drawn $3,539.00 on the 25th of September.

26 Q. That you deposited?

A. On the 25th of September, 1882, and my check book shows that I was there continuously until some time in December.

(Mr. McGinnis:) Nobody denies that.

(Mr. Parsons continues:)

27 Q. You were asked why, inasmuch as the plaintiff let you into a portion of his contract and had agreed to carry you through a period of a year, and inasmuch as you had paid nothing to the plaintiff for the interest assigned to you in the Col. Sellers contract, you didn't tell him of the information that is contained in the letters from your father and mother. I will ask you whether your contract by which you obtained the one-sixth interest from the plaintiff in the contract of the 17th of February, 1882, had anything to do with the purchase by your brother of the remaining interest of the plaintiff in said contract on the 19th of October. Did the conveyance have anything to do with his obtaining the conveyance of the 19th of October of his remaining interest?

A. No; my brother had nothing whatever to do with it. That contract I took from Mr. Bowman without the knowledge of my brother and at the solicitation of Mr. Bowman on March 25th. I use the word solicitation advisedly.

28 Q. Had you any interest in the property conveyed by the plaintiff to your brother, W. F. Patrick, on the 19th of October, 1882, of his remaining interest in the Col. Sellers and Accident mining properties at that time or at any other time, before

673 or since?

A. Purchased on the 19th of October? None whatever.

29 Q. On the 19th of October—that was the time the conveyance was made?

A. I had no interest in that contract whatever.

30 Q. Have you had any interest at any time in the Col. Sellers and Accident properties except the interest that you derived by virtue of your contract with the plaintiff of the 25th of March, 1882?

A. None whatever. I do not know as I ever received a dollar from him even for services.

31 Q. You say that your brother, W. F. Patrick, met you in St. Louis on the 19th of October, 1882, and that you know of that date because of some circumstances which you did not give?

A. The circumstance is the fact that, I think, along about nine or ten or say between nine and eleven my wife and I went down-town to purchase a wedding gift for Mr. E. C. Jewett, who was to be married that evening, and while in Gerrard and Company's store *and* we met my brother and his wife, who were there on the same errand.

32 Q. You say you do not recollect whether you knew of any strike or discovery of ore in the Col. Sellers shaft on the 19th of October, 1882, or being informed of any discovery of ore previous to that date?

A. I have tried to refresh my memory on that matter, and I think that the only conversation I had with my brother on that date—previous to going to Mr. Bowman he asked me in the presence of my wife and his wife if I would not go around with him to Bowman's office; that he wanted to make a demand for a deed and present his note. On the way I asked him how things were looking, and I think he remarked that he hadn't been there for some time and hadn't heard very particularly about the matter, but he thought things were looking pretty well. This was even more encouraging to me than I had ever heard from anybody else, and that was about the only thing that I heard on that day that was encouraging. I want to state here that W. F. Patrick is somewhat known as being very conservative in his language, not only to his friends, but also to his brothers, and he is prone, if anything, rather to understate than to overstate.

674

33 Q. Did you know that your brother had not been to the mine since the 30th of August previous to that?

A. He told me so.

34 Q. You stated in your cross-examination that when you went to Bowman's office with your brother, W. F. Patrick, for the purpose of surrendering up Bowman his note on June 19th, 1882, and for the further purpose of procuring his deed in pursuance of that contract that you found Mr. Bowman very busy; that you had but a few minutes' conversation with him. Is that correct?

A. That was correct; yes. I think without hesitation that is the fact; that is the way I found his office on every occasion I went there; sometimes I would have to wait as much as an hour or more before I got an opportunity to speak to him.

And further witness saith not. JAS. M. PATRICK.

Subscribed and sworn to before me this 30th day of December, A. D. 1887.

JAMES B. KNOBLOCK,
[SEAL.] *Notary Public, Lake County, Colo.*

Whereupon the taking of testimony was continued until Saturday, November 26th, 1887, at 9.30 a. m.

At 9.30 a. m. Saturday, Nov. 26th, 1887, the taking of testimony was resumed.

675 Present: E. McGinnis, Esq., counsel for plaintiff.
" C. C. Parsons, Esq., of counsel for defendants.

LYMAN ROBISON, a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct examination by C. C. PARSONS, Esq.:

1 Q. State your name, age, occupation, and place of residence.
A. Fifty years; Cañon City, Colorado; mining and real estate.
2 Q. How long have you lived in the State of Colorado?
A. Since the middle of July, 1878; I think I came here about the 12th or 13th.
3 Q. When, if at all, did you first come to the city of Leadville, Colorado?
A. Well, that was the 12th or 13th of July, 1878.
4 Q. How long did you remain in Leadville before moving to your present place of residence?
A. Five years; a little over five years and two months; about five years two months and a half.
5 Q. When did you leave Leadville to become a resident of Cañon City, Colorado?
A. I think it was 1883 when I left here, say the fall, September, 1883.
6 Q. And between the month of July, 1878, and the month of September, 1883, you resided continuously in the city of Leadville?
A. Yes, sir.
7 Q. Were you one of the locators of the Col. Sellers and Accident Lode mining claims, situate on Iron hill, Lake county, Colorado?
A. Yes, sir.
8 Q. Was Theodore C. Stebbins also a locator of said claims?
A. Yes, sir.
9 Q. The two claims were located by you and Mr. Stebbins
676 alone, were they not?
A. No—that is, the Col. Sellers—yes; they were.
10 Q. And so was the Accident?
A. Yes; there was another name previous to that.
11 Q. The location certificate shows that. Are you the Lyman Robison whose name is signed to a contract which I now hand you and which has been introduced and marked Defendants' Exhibit "A"?
A. (Witness examines exhibit.) *A.* That is my signature.

12 Q. You are the same Lyman Robison?

A. I am.

13 Q. You may state, if you know, when William F. Patrick commenced the work of sinking the shaft on the Col. Sellers claim under this contract.

A. If I have got that right, the contract to Bowman and Patrick—this is my memorandum, the 17th of February, 1882.

14 Q. That is the date of the contract?

A. Yes.

15 Q. When was work commenced under that contract by Patrick and Bowman?

(Mr. McGINNIS:) That is not in controversy; that has been testified to by everybody.

(Mr. PARSONS continues:)

16 Q. Have you any knowledge of the location of the Little Hope claim by parties called jumpers in the month of March, 1882?

A. Yes; I have.

17 Q. State when that difficulty commenced with reference to the commencement of work of sinking a shaft on the Col. Sellers claim by Patrick and Bowman under this contract, Defendants' Exhibit "A."

A. Well, we went up there with our tools to commence sinking a shaft and the jumpers were there on the ground.

18 Q. Do you remember the names of the jumpers?

A. Well, there is one man by the name of O'Neal.

19 Q. McNeal?

677 A. There is an O'Neal and there is a McNeil and there is a McPhee.

20 Q. And McKenzie?

A. And McKenzie, and there is a Cornishman there that I can't think of his name, a little fellow.

21 Q. Did they claim any portion of the ground covered by the Col. Sellers and Accident claims?

A. Yes.

22 Q. What was the name of their location?

A. Little Hope.

23 Q. When you say that "we went up there with our tools to commence working" who do you mean by "we"?

A. I mean we went up, Jack Drummond—when I said "we" I meant those interested in the property.

24 Q. You were interested in the property?

A. Yes, sir.

25 Q. And had you anything to do with the sinking of the shaft?

A. No; that was done by this contract.

26 Q. Who was the contractor that had charge of the work of sinking the shaft on the Col. Sellers under Patrick and Bowman at that time?

A. Jack Drummond.

27 Q. What was done by you and Mr. Patrick and your co-owners when you were notified that the jumpers were on your ground?

A. I got the constable and had them arrested and was made a deputy myself.

28 Q. Were they taken before any court?

A. Taken before Justice O'Brien.

29 Q. What was done there?

A. Bound over to the grand jury.

30 Q. That was followed by what?

A. Well, then from there to the district court, and I believe you made arrangements there and had the thing nollied.

31 Q. Were indictments filed?

A. They were indicted; yes.

32 Q. *We* nollied the indictments?

A. They were indicted before the grand jury, and they were nollied.

33 Q. What was the arrangement by which the indictments were nollied?

A. They were not to interfere with us.

678 34 Q. In what respect?

A. Not to interfere with the sinking of the shaft.

35 Q. Were you advised as to the probability of convicting these jumpers on the indictments found against them as the difficulty of it; were you advised as to the difficulty of maintaining the indictments against the jumpers?

A. Yes.

36 Q. What advice did you receive in that respect?

A. We didn't have a valid location.

37 Q. Why not?

A. We didn't have any mineral.

38 Q. As a matter of fact, had there been any discovery of mineral in rock in place at that time?

A. Not a particle; impossible to have, because we hadn't sunk only, I think, forty-seven to fifty feet.

39 Q. And the sinking that had been done, the forty or fifty feet you speak of, was done before the contract?

A. Before the contract with Patrick and Bowman.

40 Q. And the workings upon the claims at the time that the contract with Patrick and Bowman was made was in what formation?

A. In porphyry.

41 Q. And that disclosed no mineral in rock in place?

A. No, sir.

42 Q. Or mineral of any character?

A. No, sir.

43 Q. What was the arrangement with the jumpers, if any, in regard to the future contest over the property after the indictments were nollied; how were you to determine your rights?

A. We were to determine the rights—the way we did determine the rights was the first one to strike mineral.

44 Q. Was the arrangement that you were to decide the matter in the courts?

A. That is the arrangements, that we were to decide it in the court on the validity of the ownership of the property.

679 45 Q. From that time on—that is, from the time that that arrangement was made with the jumpers by which each was to prosecute the work of development without interference with the other—was there a contest or race for mineral between the two parties?

A. Yes, sir.

46 Q. Yourself on the one side and the jumpers on the other?

A. Yes, sir; there was.

47 Q. Were there any suits commenced about that time?

A. Oh, yes; Mr. Stebbins and me were taken up.

48 Q. What I mean, was there a suit commenced for the purpose of determining the right to the ground?

A. Yes, sir.

49 Q. By the owners of the Col. Sellers and Accident against the jumpers?

A. Yes, sir; against the Little Hope.

50 Q. Under your contract that you and your co-owners of the Col. Sellers and Accident claims made with Patrick and Bowman, it was provided that Patrick and Bowman should make application for patent for the Col. Sellers and Accident claims?

A. Yes.

51 Q. Was that done?

A. It was done by Mr. Patrick.

52 Q. Do you recollect when the patent survey was made?

A. Well, that—that I do not think happened until 1884.

53. Q. Yes, it did.

A. 1883.

54 Q. The contract provides that they were to commence it within sixty days?

A. To apply for patent; yes.

55 Q. Not when the patent was obtained?

A. They were to apply for patent within sixty days—that is, in writing.

56 Q. Then after applications for patent were made under the contract with Patrick and Bowman, were there adverse suits commenced by the owners of the Little Hope location?

A. Yes, sir.

Whereupon it was stipulated between counsel for the respec-

680 tive parties that the following suits were commenced: Harvey Howard *et al. vs.* James McPhee *et al.*, No. 2261, commenced in the district court of Lake county, Colorado, complaint filed August 19th, 1882 (ejectment); John McKenzie *et al. vs.* Harvey Howard *et al.*, No. 2272, ejectment, complaint filed in support of the adverse of the Little Hope location against the Col. Sellers; John L. McKenzie *et al. vs.* Theodore C. Stebbins *et al.*, No. 2243, ejectment, complaint filed February 19th, 1883, being the adverse suit of the Little Hope location against the Accident location; Jere. Mahoney *et al. vs.* Harvey Howard *et al.*, No. 2543, complaint filed

May 21st, 1883, being an application for injunction by the owners of the Little Hope location against the owners of the Col. Sellers and Accident claims to enjoin them from shipping any ore or working upon the premises.

57 Q. You may state whether or not during the progress of the work on the Col. Sellers shaft under the Bowman and Patrick contract there was any difficulty arose which retarded the work of sinking that shaft.

A. Yes; they blew it up.

58 Q. Who did?

A. Well, it was the jumpers blew it up.

59 Q. About when did that occur?

A. Well, that occurred in—I can recollect the depth of the shaft—when the shaft was just ninety-nine feet, because they had only one more foot to go, and they took a contract for 100 feet.

60 Q. Do you know what month that occurred in?

A. No; I do not recollect what that is; in May, I think.

61 Q. How did they blow it up?

A. They blew it up with giant powder. I know Mr. Stebbins and myself and some of the parties in Chicago paid the expenses.

62 Q. Mr. Patrick paid it in the first instance, didn't he, and you afterwards settled with him?

A. Yes; he paid it in the first instance; and we then paid for it, though I agreed to do that with Mr. Patrick.

681 63 Q. You and your co-owners repaid that to Mr. Patrick after the mine began to produce mineral?

A. Yes; in the final settlement.

64 Q. Now, I will ask you whether from the time that Patrick and Bowman began to sink a shaft upon the Col. Sellers under their contract with you owners down to the time that you began shipping ore from the Col. Sellers mine you were about the mine watching the various stages of its development.

A. Oh, I was there sometimes every day; sometimes I would skip one or two days. I was there constantly.

65 Q. Were you at the shaft that I have mentioned in my last question constantly during the month of July, 1882?

A. In July; yes.

66 Q. You may state whether or not prior to the 1st of August, 1882, there was any discovery or indication of mineral in that shaft.

A. No; we did not discover it that month.

67 Q. When, if you know, was mineral of any sort or indication of mineral first encountered in the Col. Sellers shaft that was sunk by Patrick and Bowman under their contract of the 17th of February, 1882?

A. Yes; the first mineral that we seen was a little stringer; that was August—that was either August 14th or 15th—because I took you up there the very next day. I took Mr. Parsons up the very next day; that must have been the 15th of August. I took him up,

then, August 16th. Now, it might have been the 14th, but I think it was the 15th.

68 Q. You may describe, if you can, the character of the mineral—the width of the mineral—as it appeared in the shaft that was encountered there about the 14th or 15th of August, 1882.

A. Why, it was *phyrites* of iron; just a little gash in the porphyry. It was started in from, say, a knife-blade to maybe two or two and a half inches, then go down the shaft like, then
682 we went right into porphyry.

69 Q. Was there any lime formation around this seam of mineral that you have spoken of—that is, was it all porphyry or was there any lime there?

A. Well, now, I do not — my recollection of the matter there at the time. I know that we considered it as nominally nothing, and it came in so thin and pitched out so quick we didn't regard it as anything. Now, if you will let me state, if admissible, I took Mr. Parsons up—I wanted to make a valid claim and of course was anxious to get the mineral first and took Mr. Parsons up to see if that would be considered sufficient to make a valid claim, and his answer was, "I think not." That *was* about as near as I can get it; he didn't think that the courts would so look upon it.

70 Q. Do you know at that time what formations of rock the mineral was supposed to lie in this camp?

A. Why, that is the mineral is supposed to lie between the porphyry and lime.

71 Q. Your contract of the 17th of February, 1882, provides that Patrick and Bowman shall sink to limestone in place or bed rock unless pay mineral shall sooner be found?

A. Yes.

72 Q. Can you state what their object was in going to limestone in place of bed rock?

A. Why, the property was not considered anything more than of prospective value, and that was my own remarks to Mr. Patrick in making this contract, that I would not——

73 Q. The question is, why was the point at which they were to sink fixed by the limestone in place of bed rock?

A. That was fixed by me.

74 Q. Why to bed rock?

A. I never would let go the idea in this contract — I would give up an interest in this property unless Mr. Patrick would agree to go to bed rock unless mineral was found before that, and finally
683 we agreed that if he would go to bed rock and find no mineral he could take his machinery and take it off.

75 Q. And take a half interest in the property?

A. Yes.

76 Q. Do I understand you to mean that if he went to limestone in place of bed rock and discovered no mineral that that would be an indication to you that it would be useless to sink further?

A. Yes, sir.

77 Q. Because the mineral laid between the limestone and foot wall and hanging wall?

A. Yes; a hanging wall, as I thought, as the nature of the contract will show.

78 Q. You say that you took me up to the mine, you think, about the 15th or 16th of August, 1882. For what purpose?

A. Why, I came to you that morning and said that they have ore; they have found a little bit of mineral, and, as to our future litigation, I want you to go up and look at it yourself and go down the shaft so as to see whether we had a valid location, and you went up with them and you then met Mr. Patrick just half way. He was coming down the shaft as you was going up, and you says to him—I can't give you the exact words—you said, "How does it look?" and Mr. Patrick then made the remark that the thing was far from encouraging. He didn't stop more than about two minutes.

79 Q. You say that you didn't deem the seam of mineral that was discovered at that time of sufficient value to follow it?

A. Well, that was your advice; I did not, and that was your advice. You said to me at the time that it is not mineral in place.

80 Q. What did you do after that? What was done in the shaft after that?

A. We kept right on sinking. They were working night and day to get ahead of the jumpers so as to get mineral in place first.

81 Q. Were you watching the property closely at that time?

684 A. You may rest assured I was; yes, sir.

82 Q. For the purpose of making the first discovery?

A. The very first; yes, sir.

83 Q. How much experience have you had in mining in this camp?

A. Well, I will answer that two ways. I commenced mining before I ever came to this country—lead mining in Dubuque, Iowa—and then I came here and had been mining some other properties in different parts of the State.

84 Q. Are you familiar with the formation in and about Leadville?

A. I am; yes, sir.

85 Q. Are you well acquainted with the formation on Iron hill?

A. Yes.

86 Q. What do you say as to the frequency or otherwise of the occurrence of seams of iron pyrites or stringers, as you call them, in the porphyry on Iron hill?

A. That is a very common occurrence. We call them gash.

87 Q. State whether or not the occurrence of a stringer of iron pyrites when found in a porphyry rock in sinking a shaft on Iron hill or in this camp is any indication of the near presence of a body of mineral.

A. Just about as much as a bunch of snuff would be to a jar of snuff—almost nothing.

88 Q. Would it be taken by a miner of experience as adding any substantial—anything to the substantial value of a mining property in which it occurred?

A. Not one penny.

89 Q. Did you at the time that you examined this property and

when this little stringer was encountered, did you regard it as of any particular value except, perhaps, as giving you some advantage over the jumpers of the discovery of mineral?

A. Well, I regarded—it would not do me any good in court, and, of course, I didn't regard it as anything. I knew the decisions so well; you know that, of course, and you yourself told me it
685 didn't amount to anything, and this what you told me not to be guided a particle by it, and kept on sinking.

90 Q. Can you state when, at what depth this little stringer of mineral that you have testified concerning was encountered?

A. Yes; I have got that here; I know it so well; I have got it 234 feet—that is, the stringer, not the mineral.

91 Q. Do you recollect that on the 16th of August, 1882, you made a compromise contract with Mr. Patrick with reference to the future development of the property?

A. I do well.

92 Q. Who drew that contract?

A. Bissell, I think; Bissell drew that contract. I had something to do with it, so much, and I think it was Judge Bissell; I recollect how it happened and all.

93 Q. You may state whether at that time you conceded that the contract of the 17th of February, 1882, had been performed.

A. I said decidedly it hadn't, and I refused to give Mr. Patrick his deed, and I didn't give the deed, and, in other words, I told Mr. Patrick point-blank that I decidedly and absolutely refused.

94 Q. To give the deed?

A. Yes, sir.

95 Q. Because why?

A. And told him that in your office and in your presence; why, because we had no mineral in place, and finally Mr. Patrick conceded the fact.

96 Q. Now, you may state when next any mineral was found in the Col. Sellers shaft after the discovery of the stringer.

A. 234; I have got it 265 feet. I have known this, understand, from memory.

(Mr. McGINNIS:) You mean giving this distance of 234 feet, too?

97 Q. What was the date?

A. 234 feet was when the stringer came in.

98 Q. What was the other?

A. 265.

686 (Mr. McGINNIS:)

99 Q. So that you are giving this 234 and 265 feet from memory?

A. More than that.

100 Q. What was it?

A. From the measurement dip of the vein. I knew the dip of the vein, you see.

(Mr. PARSONS continues:)

101 Q. You may tell when the mineral was encountered at the depth of 265 feet.

A. What character of mineral do you mean?

102 Q. The date when it was encountered.

A. Well, that was—let me see—that was about the 30th of August.

103 Q. Of what year?

A. Why, 1882. I have got so many dates around 1882 and 1883 I do not remember.

104 Q. What was the character of the mineral that was encountered on the 30th of August, 1882?

A. That is my opinion.

105 Q. Yes; that is your knowledge of the mineral?

A. We encountered it at the time; of no value; the treatment was so big it was not really anything.

106 Q. What was the character of the ore?

A. Oh, largely pyrites of iron.

107 Q. Was it what you call sulphide ores?

A. Yes; sulphide; largely composed of *p*hyrites of iron.

108 Q. Can you describe the extent of it at that time?

A. Well, of course, I could not describe the extent of it, because we just got into it; that I do not know.

109 Q. Did you encounter the ore at that date that you expected to encounter?

A. No, sir.

110 Q. What did you expect to encounter?

A. We expected to encounter good ore.

111 Q. What kind of ore?

A. What kind of ore?

112 Q. Yes; as distinguished from sulphide ore.

A. We expected to strike a carbonate ore. I did not expect to strike sulphide ore.

687 113 Q. Can you state whether any difficulties were encountered about the time that you struck ore?

A. We was trying to handle the water with a bucket; we could not do that; then we next tried a steam pump, and that would not handle the water; then we next got, I think, what we call a Cornish pump.

114 Q. Did that involve the expenditure of considerable money?

A. Very largely.

115 Q. Do you recollect when you first commenced shipping ore?

A. Yes; we commenced shipping ore in March of 1883.

116 Q. Can you state about how much money was expended from the time that you made your agreement between the several owners of the property and Mr. Patrick on the 16th of August, 1882, from that date down to the time that you commenced shipping pay mineral?

A. Well, I can; it was over $20,000—something over $20,000 before ever we got—I know we didn't get any dividends until some time after that.

117 Q. Do you know when the first dividend was declared?

A. The first dividend was declared in July. I can give the date of July, 1883. I can't give the date.

118 Q. Had all the expenses of the mine been paid at the time of the declaration of the first dividend?

A. No; I think not quite; there was still some more back, but then Mr. Patrick said we could afford to give a dividend and discount the future a little bit.

Cross-examination by E. McGINNIS:

X 1 Q. The veins on Iron hill and in this camp generally are called blanket veins, are they not?

A. That is what some call them—deposits or blanket veins.

X 2 Q Their general direction is horizontal and not vertical?

A. That is what we consider they are.

688 X 3 Q. Of course, they did more or less, but their general direction is horizontal?

A. That is what they are called.

X 4 Q. You go down through various stratas of rock until you find them, if you find them at all?

A. We go through porphyry.

X 5 Q. You say that the expenses caused by repairing the shaft blown up by the jumpers was afterwards repaid to Mr. Patrick by yourself and Stebbins and some of the owners who resided in Chicago?

A. Yes, sir.

X 6 Q. That was $394.85?

A. I know it was nearly $400.00.

X 7 Q. You and Mr. Stebbins gave a note to Mr. Patrick for that?

A. Yes; we did; I think we did give a note; yes, we did.

X 8 Q. Do you remember the date that you gave the note; was it before Mr. Patrick had paid out the money or afterwards Patrick paid the money, $394.85?

A. Well, it was done, I think, in May of 1882, because he met me in the Clarendon hotel, and he says, "Your prediction has come true. I insisted upon Mr. Patrick keeping a watch on that property, and his answer was, I have given a contract and I insisted on keeping watch and he laughed at the idea of blowing up the shaft," and I told him "they would do it as sure as the sun set," and we went into the hotel, and he says, "Mr. Robison, you ought to pay that."

X 9 Q. Did you afterwards pay that $394.85 to Jack Drummond and others for repairing the shaft?

A. Yes.

X 10 Q. When did you and Stebbins make the note by which you repaid him that $394.85; was it before he paid it to Drummond in 1882 or afterwards?

A. I said, I have been paying out a good deal of money here, not only there, but in different transactions, you know; and I says, I told him, "What I will do I will pay you out of the first proceeds of pay mineral," and I do not recollect now how the note was drawn

up. I do not recollect, but that was the understanding and
689 it was perfectly satisfactory to him.

X 11 Q. The question I asked you was, Was the date of that note, so far as you now remember—the date it was made, not the date it was payable—after Patrick had paid the $394.85 to Drummond and others or before he had paid it?

A. I can't tell you when Mr. Patrick paid. I do not know. I suppose he paid it in the end.

X 12 Q. At the time he got the note from you, did he tell you he had already paid the money out for it? When he asked you for the note for $394.85, did he tell you that he had already paid the money for repairing the shaft and that was the amount?

A. I do not know as I can answer that question.

X 13 Q. You do not remember?

A. I might remember it for awhile, but I can't get that in my head just now.

X 14 Q. Do you know how long that note run before it was due? How many days after date was it payable?

A. I do not know how the note was drawn up. I do not recollect at all.

X 15 Q. When was that note paid?

A. My recollection now is it was paid out of the first proceeds of mineral.

X 16 Q. When was that?

A. That was when we got our first dividend, in July, 1883, I think it was. My recollection is that that was the contract that I made with him. I told him I didn't want him to press me for the money.

X 17 Q. So Mr. Patrick on one side and you, Stebbins on the other and the Chicago parties had a settlement in July, 1883?

A. No; I didn't say that.

X 18 Q. What do you say?

A. I said Mr. Stebbins and myself. We made that arrangement with Mr. Patrick. I do not know that the others paid a nick*le*. I said to Mr. Patrick that Charley and me would probably have to pay it out of our own pocket, but that is all right; we want you to go on.

690 X 19 Q. It was a private deal between you and Stebbins on the one side and Patrick on the other?

A. That was when the shaft was 234 feet.

X 20 Q. This repayment of $394.85 was a private transaction between you and Stebbins on the one side and Patrick on the other?

A. Yes.

X 21 Q. And was paid in July, 1883, by you to Patrick?

A. That was my recollection—that it came out of the first proceeds in July, 1883.

X 22 Q. It was not in 1882?

A. No, no; I am pretty sure it was not in 1882.

X 23 Q. Is it not a fact that on Iron hill, in the Col. Sellers shaft, that various little stringers of ore were cut some distance before you reached the body of ore?

A. Yes; as I have stated.

X 24 Q. That is more than one or only one?

A. There was a little on each side of the shaft—there was a little stringer on each end of the shaft—and very thin, and I think probably the widest part would be two or two and a half inches of this pyrites of iron.

X 25 Q. Is not it also a fact that these stringers sometimes commence in the material that is in the shaft and not in the mineral and don't show in the sides? Don't they run a little distance and quit?

A. Well, yes; certainly run a very little distance.

X 26 Q. No; don't they run from one side to the other and never leave their indications on the sides of the shaft? Whether or not also other stringers commence in the middle of the shaft and run some distance and quit.

A. Are you speaking of general formation?

X 27 Q. What is the dimensions of the shaft of the Col. 691 Sellers?

A. Four by eight feet in the clear, beside the timbers.

X 28 Q. Is it not a fact that on Iron hill, where the Col. Sellers mine is, that these little streaks or stringers of which you have spoken sometimes commence in the material in the middle of the shaft, run down a little depth and quit, and never appear at all on the sides of the shaft?

A. Well, I do not know; I can't call to mind any such case as that, but that I have heard of so many cases, and I think undoubtedly that would be true.

X 29 Q. Consequently an examination made to-day on the sides of the shaft would merely disclose these stringers that went out from the shaft into the adjoining rock, would it not?

A. Yes; but there were only two there.

X 30 Q. I am asking you now as a mining man and knowing the character of that hill; so I say that there could be stringers beginning and ending in the material taken from the shaft that would not show on the wall because they begun and ended in the material in the shaft.

A. Yes, sir.

X 31 Q. Therefore an examination of the shaft to-day would disclose only these stringers that passed out of the walls of the shaft?

A. Yes, sir.

X 32 Q. And would not show this that began in the shaft and ended in the shaft; is not that so?

A. No; I do not know that that is necessarily so.

X 33 Q. It is frequently so?

A. I do not know that that is so.

X 34 Q. Therefore an examination of the sides of the shaft to-day would disclose only these stringers that passed out through the sides of the shaft, but would not show these stringers that began and ended in the middle of the shaft.

A. That would be impossible.

X 35 Q. It would not show, then, would it?

692 A. You could not help to see it; the way you put the question——

X 26 Q. Would an examination of the shaft to-day show these stringers that began and ended in said shaft and never passed outside the walls?

A. But I examined the dirt every time I go there.

X 37 Q. I am not asking about what you examined. I am asking what an examination of the shaft to-day would disclose. Would that disclose these stringers that began and ended in the shaft material?

A. No, no; not in the material.

X 38 Q. Of course, what you saw in the shaft, that is another question. We will get at that in a different way. Now, you say this first streak or stringer extended from one wall of the shaft to the other; you think was discovered along about the 15th of August, 1882?

A. It was in 1882. Well, I would rather put that down the 14th or 15th.

X 39 Q. Now, suppose a considerable body of ore which was not a stringer, but one that extended entirely across the shaft, covered the entire shaft.

A. Yes, sir.

X 40 Q. A well-defined body of mineral. Suppose that was the one that was discovered, not on the 14th or 15th of August, 1882, but on the evening of the 8th of August, 1882. You have your dates badly mixed. You are talking about something that occurred in August which really occurred in July, as you will see after awhile. Then how far above that vein of mineral which I have just mentioned in feet was this stringer about which you have testified?

A. Well, if I answered your question correctly—I do not know whether it is well answered or not—but when we struck the stringer was one day and when we struck the body of mineral another day. Do you want to know the difference between them?

X 41 Q. I want to know the difference in time.

693 (Mr. PARSONS:) The only objection is that he assumed that the main body of mineral was struck on the 8th of August, whereas the fact shows that it was not struck until the 30th of August.

(Mr. MCGINNIS continues:)

X 42 —. Now I want to know. Answer my question, please.

A. I do not recollect the difference. He wants to know the difference between 234 and 265. I do not know how long it took Mr. Patrick to go through it. I know it was intensely hard.

X 43 Q. Do you know the rate per day they were making about that time?

A. One of the men that was working there said about a foot a day.

X 44 Q. About a foot a day?

A. That was what he said at the time. It was so intensely hard that they could not make more.

X 45 Q. Therefore, if this body of mineral that you state was struck at a depth of 234 feet——

A. Not mineral. I did not say that; I said the stringer.

X 46 Q. You said the stringer was struck at a depth of 234 feet?

A. Yes, sir.

X 47 Q. But suppose it should turn out that you were mistaken; that 234 feet in depth was a small body of ore or a layer of ore?

A. I do not know that I can be mistaken about that. I do not know I am mistaken about that.

X 48 Q. Let me read you something.

A. Because I seen it.

X 49 Q. You have got your dates mixed and your distances. I read you now from a letter already heretofore offered in evidence, dated Asbury post office, Knoxville, Tennessee, August 17th, 1882, stating, written in Knoxville, stating, "On last Tuesday"—that was August 15th, 1882—"Eddie and self went to R. to bring out Mrs. Dickinson. We stopped to see Anne. Of course found Mrs. Hale feeling better, but very weak. A. was jubilant over a letter
694 received the day before"—that would be on the 14th of August, 1882—"from William"——

A. I can answer that question, sir.

X 50 Q. He wrote here that they had found mineral in the Sellers, but he thought it was only a small pocket in the porphyry. "While we were there," that was on August 15th, "the evening mail brought another letter from Willie which he carried to A. in order that we might have the very latest news before going home. In this letter he stated that a clearly defined mineral vein extended entirely across the shaft and he was more than pleased with the outlook of the mines." Now, referring to that vein described in that letter, what have you to say?

Question objected to for the reason that the witness is called upon to express his opinion as to a statement contained in a letter quoted from and not called upon to answer as to any question of fact within his own knowledge, and, further, for the reason that the letter quoted from is incompetent testimony for any purpose whatever in this suit, and for the further reason that the witness has no knowledge of the letter, it does not appear that he knows who wrote the letter, and it does not appear that the persons mentioned in the letter is any party connected with this suit, or that any party connected with this suit is responsible for any statements contained in said letter, and that the question itself is irrelevant, incompetent, and immaterial to any issue in the case.

(The last foregoing question was repeated.)

A. Well, now I seen that myself; I answered that question some time ago.

X 51 Q. Seen what?

A. I seen that same thing; I do not know who wrote that letter and do not care to know. I seen that little gash vein. I an-
695 swered that a little while ago when I said that I took Mr.

Parsons up there on August 16th and get his advice as my attorney, and he told me that would cut no figure as a valid claim and to go on sinking.

X 52 Q. Now, didn't you say just now that you met Mr. Patrick going down the hole after that was done and he said he saw nothing very encouraging?

A. On that day?

X 53 Q. Yes.

A. I said that some time ago.

X 54 Q. Then this could not have been the vein referred to, because here he is more than pleased with the mines.

Question objected to because it is argumentative and the expression of opinion of counsel for the plaintiff and does not call for any statement of fact within the knowledge of the witness and is calling for a mere matter of opinion.

A. I know better; I know just what I know; I know it good and I know it well, and I know what Mr. Patrick's remarks were, and I know it pitched out of the shaft and left us in solid porphyry and pitched very abruptly, too. I cannot be fooled well on that. I would only have been too glad if it had been mineral.

X 55 Q. You were present, you say, in Leadville and watching the shaft very closely during the month of July, 1882?

A. Yes; I was living here.

X 56 Q. Was Mr. Patrick there also during the month of July, 1882—in Leadville?

A. Of July, 1882?

X 57 Q. Yes.

A. Well, I think he was; he was here in August.

X 58 Q. And in July, 1882?

A. Yes; he was here in August; I recollect a conversation with him on the hill.

X 59 Q. If he was here in July, 1882, he was superintending the sinking of the shaft, was not he?

A. He had given a contract.

X 60 Q. And was interested in the property and looking it over and interested as much as you were?

A. Yes, sir.

696 X 61 Q. Did you see him often?

A. If he was here in June and July—and undoubtedly he was. I was here all the time. I was not away.

X 62 Q. Did he, during the month of July, express to you that at any time during that month that things in the shaft looked very encouraging?

A. In July?

X 63 Q. Yes.

A. No; I do not know that he ever made a remark of that kind to me, for there was not anything; that is the reason. I do not think he would say it. There was nothing in July.

X 64 Q. Now, let me show you a letter written by Mr. Patrick on July 31st, 1882, from Leadville, to his brother James, which letter is

already offered in evidence, in which occurs this language: "The shaft on the Col. S. is now about 215 feet, and is looking very encouraging."

A. Now, I can answer that, as a mining man, straighter than a gut. When a man is sinking in a shaft and comes to a body of porphyry heavy stained with iron, he feels encouraged. If it is heavy stained in iron—that is, notice from that on—hopes up to-day, down to-morrow. That is mining, and every man knows it.

X 66 Q. And that porphyry heavily stained with iron is a favorable indication while it lasts?

A. No; I have seen a shaft up here on Carbonate hill, and seen them (stains) a few feet from the surface, and I have sunk down 125 feet and get nothing.

X 67 Q. It is not an indication, but it is an indication?

A. No, sir; it is no indication. I have mined too much for that. It is no indication; water will make a stain in porphyry.

X 68 Q. Is not it the theory of all of these deposits in Leadville that deposits are occasioned by water?

A. No, sir; not with me it is not.

X 69 Q. But all the scientific men say so?

697 A. I do not care a curse; it is not. There is no water formation about it.

X 70 Q. They say so?

A. Some do and some do not; they don't know as much as we do.

X 71 Q. Consequently this stain that was in the rock does make it a very favorable indication. Did the iron stain?

A. I do not believe it —.

X 72 Q. Then is not that your theory? But you know that it is held by others that it is a favorable indication—that is, the iron stain?

A. Well, I may say I stated my opinion on that because I have seen it so much in mining.

X 73 Q. But you admit that others have a different opinion from you on that subject?

A. Bless you, there are as many opinions in this camp as there are hairs in your head.

X 74 Q. Is it not an opinion held by scientific men and practical miners that porphyry heavily stained is a good indication?

A. I cannot admit all that.

X 75 Q. Don't you know that it was Mr. Patrick's opinion?

A. It is evident from his letter that he had some hopes of it, but I hadn't.

X 76 Q. He was a mining man prior to that and assayer besides?

A. Yes, sir.

X 77 Q. You are not an assayer?

A. No, sir.

X 78 Q. And therefore he is better informed on the subject than you are?

A. That Mr. Patrick can decide.

X 79 Q. Were you assaying any of these streaks you were getting prior to reaching what you call the ore body to find what they run in silver?

A. No; I do not think I ever assayed any porphyry.

X 80 Q. Did any of them ever assay them?

A. I can't answer as to that. I have had mineral assayed.

X 81 Q. You do not know but what Mr. Patrick was as-
698 saying that or had it assayed?

A. I do not know about that.

X 82 Q. Now, to refresh your recollection as to whether these stringers were cut, I will read you an extract from the Leadville Herald of July 30th, 1882; it has already been read in evidence in this case, which is merely to refresh your recollection: "The Col. Sellers shaft on Iron hill is now down about 215 feet. Some small stringers of ore have already been cut, one of them assaying nineteen ounces in silver. The sinking of the shaft is progressing rapidly, with prospects that the ore body will soon be reached."

A. Swear me again; that is not true.

X 83 Q. You were here on July 30th, 1882?

A. I was right on the ground all the time. Papers don't go with me. I know what I am talking about.

X 84 Q. In other words, you are mistaken both as to dates and depths, as you will see. I know you don't like to be convinced, but you will be all the same. If that was not true, did you correct it to anybody?

A. Oh, I never went to the Herald. I never went to a paper and stated a word, yes or no. I attended to my own business.

X 85 Q. Don't you recollect that prior to August 10th, 1882, that that streak or mineral vein described in the extract I read you was cut into a distance of four feet prior to August 11th, 1882?

A. No, sir.

X 86 Q. You do not remember that?

A. I remember what I am answering.

X 87 Q. You do not remember anything of that kind?

A. It is not true; I want it to go down; I am so positive. I took Parsons up there, for I wanted to make the claim valid and it was not valid.

X 88 Q. That was the difficulty between you and the jumpers, as to who would be entitled to the title?

699 A. Yes; we wanted to get mineral first so as to get title.

X 89 Q. That is what you were talking about, as to whether it would be sufficient for that?

A. Yes; I acted on the advice of counsel at every step.

X 90 Q. Did you keep any memorandum of those dates and depths about which you have been testifying?

A. As to putting them down?

X 91 Q. Yes.

A. No; I do not know as I did; I was here all the time and I didn't regard it as necessary.

X 92 Q. Where did you get your distance of 234 feet that you have mentioned in your testimony?

A. I can answer that plainter than any man who ever lived on earth.

X 93 Q. Well?

A. I felt something about Iron hill, that I knew the dip of the veins there, and I felt that if ever we would get mineral, if we ever had got mineral, we ought to get it at 230 feet, according to my figures, and if we didn't get it at 230 feet I never expected to get any ore.

X 94 Q. But you have mentioned 234 feet here in 1887; this thing occurred in 1882; you say you made no memorandum nor writings to refesh your recollection as to the 234 feet; I ask you now how you know it is 234 feet.

A. How do I know it? I recollect it so well because I came so close to it; I wanted to bet Mr. Patrick a hat that I could come close it; he would not take the bet.

X 95 Q. How do you recollect the 265 feet?

A. If you are mining and strike it, you will pretty near recollect the distance you get it; you will not need any.

X 96 Q. So that you are trusting entirely to your recollection, not aided by any written memorandum whatever made by you as to those two figures, the 234 and 265?

A. It is not necessary with me.

X 97 Q. I am not asking what is necessary, but that is the
700 fact, that you are trusting to your recollection entirely and not to a memorandum?

A. Yes; and that my recollection is good.

X 98 Q. You think it is good?

A. I know it is good; put it down so.

Re-examination by C. C. PARSONS, Esq.:

1 Q. Counsel for the plaintiff has read what purported to be a copy of an article published in the Leadville Herald of Sunday, July 30th, 1882. I will ask you whether or not it is the common practice of newspapers here to announce strikes of mineral in mining claims long before they are made.

A. I do not know; how could it be? How could they announce it if it was not there, but they jump at conclusions?

2 Q. Have not strikes frequently been announced in the newspapers that never took place?

A. Decidedly; and many times here they give you strikes or are in the newspapers when they are no strikes; they used to do that to advertise the camp.

3 Q. At the time these newspaper publications were made were you not then engaged in a race for mineral with the jumpers?

A. Yes, sir.

4 Q. And were not a good many reports published about town—I do not mean by publishing in the newspapers, but published about town—of strikes, both in the Col. Sellers and the Little Hope location?

A. Yes, sir; there were.

Recross-examination by E. McGinnis, Esq.:

X 1 Q. But in Mr. Patrick's letter of July 31st, 1882, which was the next day after this newspaper publication, he states to his own brother?

A. I know what he states.

X 2 Q. About what was said in the newspaper. Do you mean to state that Mr. Patrick was trying to deceive his brother at
701 that time?

Question objected to as being totally irrelevant and asking the witness to pass upon the motive and object of the correspondence between W. F. Patrick and his brother, of which the witness could not by any possibility have any knowledge, and as not calling for any statement of fact within the knowledge of the witness.

A. Mr. Patrick has stated to me many a time, if asked the question, "How is the thing looking?" and would say "first rate," but he never had an ounce of mineral, never had a stream, and he never did have anything until we struck this gash vein. I can't help what Mr. Patrick wrote or what Mr. James Patrick wrote; I know whereof I speak.

X 3 Q. But you stated that even after he saw this gash vein of which you spoke there was unquestionable a streak of ore, and he said that was not very encouraging?

A. He said "nothing encouraging." Mr. Parsons asked him the question.

X 4 Q. When he wrote a letter to his brother that the shaft was looking encouraging he must have meant more than that?

(Mr. Parsons:) Objected to, and you need not answer the question unless you want to.

A. I will have to state that is all I can think of. If there is anything more I can state I would do it.

And further witness saith not.

Whereupon the taking of testimony was continued until November 26th, 1887, at two o'clock p. m.

At two o'clock p. m., November 26th, 1887, the taking of testimony was resumed.

Present: As before, C. C. Parsons and E. McGinnis.

702 Frank G. White, being first duly sworn according to law, testified as follows:

Direct examination by C. C. Parsons, Esq.:

1 Q. State your name, age, residence, and occupation.

A. Frank G. White; Leadville, Colorado; manager of mining properties.

2 Q. How long have you been engaged in the occupation of a miner?

A. Thirty-three years—nearly thirty-four.

3 Q. You may state where you have mined and where you have been engaged in mining.

A. In the upper peninsula of Michigan, Silver island, Deadwood, and Leadville; mining copper, iron, silver, and gold.

4 Q. How long have you resided in Leadville, Colorado?

A. Since the 11th of January, 1884.

5 Q. What position have you occupied as a mining man in this community since you came here?

A. During 1884 and part of 1885 I was manager of the Iron mine.

6 Q. Belonging to the Iron Silver Mining Company?

A. Iron Silver Mining Company; and for the next two years I was engaged on leases on my own account at Robinson and here; for the last year I have been managing some interests that were owned in St. Louis, and am leasing for the Queen Consolidated and some other interests in which I am interested here, the Venture and one or two smaller ones.

(Mr. McGINNIS:)

7 Q. Are you managing that now?

A. Yes, sir; they are doing nothing now.

(Mr. PARSONS continues:)

8 Q. Have you been interested in the Robert E. Lee Silver Mining Company?

A. I have been as director.

9 Q. Have you been engaged in sinking a shaft upon the El Paso ground, and are you at present?

A. I am, and also have charge of it; it is between Fryer
703 hill and Yankee hill, Upper Fryer hill.

10 Q. Where are the properties of the Iron Silver Mining Company situated?

A. On Rock hill, in California gulch, Nugget gulch, and on Iron hill.

11 Q. Where are they situated with reference to the Col. Sellers and Accident mines?

A. The Lime claim lies to the west of the Sellers and a property known as the Moyer placer lies just adjoining it.

12 Q. *Dise*-lines with it?

A. Side-lines with it—well, they practically; that with the Wells and Moyer placer surround it on three sides—the Lime, Stone, Wells and Moyer, and Moyer placer.

13 Q. Are you acquainted with what is known as the Moyer shaft and underground workings upon the Moyer placer lying adjoining to the Col. Sellers and Accident mines?

A. I am. During 1884 it was sunk 100 feet while I was in charge.

14 Q. What depth had it attained at the time you quit charge of it?

A. 386 feet.

15 Q. How far is the Moyer placer from the workings upon the

Col. Sellers upon what is known as shaft No. 1 of the Col. Sellers claim?

A. From the side line of the Sellers the Moyer shaft is a little over 100 feet and may be less than 100 feet; I cannot give the exact distance. The distance from the No. 1 shaft to the Moyer shaft I can't give exact, but an estimate, about 300 feet; perhaps a little more.

16 Q. Are the underground workings connected with the Moyer shaft to the underground workings connected with the Col. Sellers and Accident connected?

A. They are.

17 Q. Are you acquainted with the formation on Iron hill, on Rock hill, and the claims surrounding the Col. Sellers and
704 Accident claims?

A. I am.

18 Q. Are you acquainted with the formation in the Col. Sellers and Accident?

A. Yes, sir.

19 Q. I will ask you whether in sinking the Moyer shaft, concerning which you have testified, you encountered seams or stringers of iron pyrites or any other kind of mineral.

A. At a depth of 286 feet I believe they encountered some iron and white iron, icy pyrites, and sulphide ores.

20 Q. State whether or not the occurrence of stringers of iron pyrites or small seams of mineral in the porphyry in the neighborhood of the Col. Sellers and Accident and Iron mine properties are of frequent occurrence or otherwise.

A. They are of frequent occurrence.

21 Q. You may state what the occurrence of these small veins or seams of mineral or deposits of iron pyrites in the porphyry rock indicates.

A. Why, it is regarded as a mineralized condition and leads to the hope of finding mineral, which is the case about one time in a hundred—not oftener than that.

22 Q. As a miner of experience what do you say as to the fact of the occurrence of such streaks of mineral in the porphyry adding anything to the substantial value of the property or otherwise?

A. It only adds a speculative value. There is no real value in any such occurrence as that.

23 Q. Do you mean by speculative value that the value of the property in that condition depends upon what the future will make it?

A. Entirely upon future developments—what may be disclosed by future work entirely.

24 Q. State whether or not the seams or stringers of iron pyrites in the porphyry necessarily indicate the near presence of an ore body.

A. Not necessarily.

25 Q. Do you know of developments on Iron hill and on
705 the neighboring hills near Leadville in which the streaks of

iron pyrites frequently occur in the shaft and which upon subsequent developments disclose no mineral?

A. I do; quite a number.

26 Q. State some instances.

A. Well, take the Moyer shaft up to the time I left. In the first instance, up to the time I left there we had sunk the shaft 386 feet. We had drifted south at that point over 400 feet, and it was in excess of 400. I can't give the exact distance from memory. We drifted nearly 100 feet, then turned to the northeast and drifted about 75 feet further. At a point 52 feet above that on top of the wall line we sent another drift to the north, but in the first place we drifted from the first level to that point. We drifted about 100 feet to that point, connecting with the lower level, and from there drifted north, as I recollect, 60 feet. We drifted northeast, finding the line contact 75 feet above this lower drift northeast. A drift had been driven over to the shaft to the Sellers mine and about 100 feet on the Sellers mine. At a point about 40 feet from the shaft we sunk a winze and drifted to the northeast, lowered to the hole to the west; a hole with the Sellers third level I think they call it. In that work not one ton nor, in fact, one fraction of a ton of shipping ore did we find that would pay. What I mean by shipping ore we shipped several lots that paid the cost of the smelter and treatment charges, no more; they then suspended work. In the Weir shaft, sunk upon the top of Rock hill at a depth of between 500 and 600 feet—I cannot give the exact depth—they spent in excess of $60,000. They have taken out perhaps $5,000.00 worth of ore, done a great deal of drifting—cannot give the measurement—and abandoned it, discovering no value, making a loss every month. We will take another shaft up there, the Littler shaft, on the Old Printer Boy claim.

It is sunk between 700 and 800 feet. At times they have
706 had values in that shaft; they spent in excess of $80,000, and have about decided to abandon the work; I do not know whether they abandoned it yet or not, but will do so very soon, no value have been discovered in any shaft driven or had ever been. The shaft sunk by the Queen Consolidated was down about 300 feet when we took hold of it, and I went and sunk the shaft to 615 feet; at a point in the shaft we struck into a belt of rock which carried seams of iron pyrites and other iron; we went through that and did some drifting, and the developments were such that we abandoned it at once; there was no evidence of value and is none to-day. In the Miami shaft *where* we spent a large amount of money, we having gone down to the iron contact and have iron, but so far have had no value, developed nothing that you could ship.

27 Q. How much have you spent there?

A. In excess of $60,000.

28 Q. Did you find these seams or stringers of iron pyrites in going down the shaft?

A. We found no iron pyrites, but we found the other iron, which is called contact iron, on that hill; immediately after that went through gray porphyry or talk porphyry, and from there until we struck flint in the bottom, but have had no value.

29 Q. You spoke of encountering a seam of iron pyrites in the Moyer shaft at a depth of 286 feet. Did you deem that of sufficient importance as a discovery to follow it down?

A. We deemed that as a sufficient discovery to follow it; we drove that drift on it and, finding no value, they decided acting upon my advice to sink it another 100 feet.

30 Q. Straight down?

A. Straight down, passing through under this, and, in fact, we had further down, excepting where we went through what is known as a fault, a fine decomposed lime; after we got through that
707 we went into a porphyry that carried particles of sulphide and iron pyrites all through it, and we continued until the bottom of the shaft, but there was not value, not even an assay, below that 286-foot level.

31 Q. How much money was expended in sinking the Moyer shaft?

A. I have planned to sink there at the time that I left something about $110,000; in excess of $100,000, but I cannot give the exact amount.

32 Q. What would you say, as a mining man having knowledge of the mines and mining claims of this camp, about the marketable value of the Col. Sellers and Accident claims by reason of encountering in the shaft a stringer of iron pyrites entirely in porphyry running from the width of a knife blade to two and a half or three inches in width and no other discovery except that made?

A. I would not suppose it would increase much, if any.

33 Q. Would the value of the property be determined by its proximity to other mines, or would it depend upon subsequent developments?

A. It would depend entirely upon subsequent development. It might have a speculative value from its proximity, but its real value depend- entirely upon developments.

34 Q. Are you acquainted with the sulphide ore that was encountered in the Col. Sellers shaft in the month of August, 1882?

A. I was not here at that time.

35 Q. Have you seen any of that ore since?

A. Yes, sir.

36 Q. Do you know what the value of it was at that time?

A. It had no value; no marketable value.

37 Q. Why?

A. There was not value enough in it to warrant shipment.

38 Q. What were the treatment or smelter charges for treating that kind of ore as compared with the treatment of carbonate ores at that time?

A. From three to four times the value; there are some
708 carbonate ores treated at $4.25 charged at that time; the cost of treatment of sulphide ores at that time was from $22.00 to $25.00, and in some cases even more than that.

39 Q. Were the treatment charges so high at the time that you had charge of the Moyer placer, Moyer shaft, that it rendered the

ores discovered in the Moyer shaft and in the drifts that run towards the Col. Sellers ground of no value?

A. It did not; the best rates I could obtain at that time was $23.00, and they charged for any excess of zinc over fifteen per cent. The value of the ore—I took three lots to the smelter to have it sample-tested; one lot went to the Harrison and the other two to the Omaha and Grant smelter, and the result was that there was not enough in the ore to pay the smelting charges and the ore was thrown out, rendering the ore absolutely valueless at that time.

40 Q. I will ask you whether in sinking a shaft on Iron hill that is entirely in porphyry that miners are not often encouraged by slight evidences, such as iron stain in the porphyry and through the little seams of iron pyrites, without having any substantial reason for encouragement.

A. I can say that is almost universally the case, where a man has acquired faith enough in a piece of ground to spend any considerable amount of money, and when he strikes any streak of iron or iron pyrites it leads him to hope that it is a forerunner of mineral. I say about one time in a hundred that proves to be the case in all the shafts that have been sunk here.

41 Q. And are not these indications frequently and in fact in a majority of cases delusive?

A. They are.

42 Q. Is it or is it not a fact that in sinking a shaft on Iron hill or anywhere in this camp that miners are often deceived by indications of iron stain and presence of white iron?

A. They are very often deceived; I have been deceived myself.

709 43 Q. State whether or not it is a fact that at some stages of development heavily iron-stained porphyry is encountered, and within a very short distance the whole formation changes and the iron passes out.

A. It is frequently the case; that has been the case. I will give you one instance: In the La Plata shaft, a deep shaft they have sunk, and they have practically suspended the mining work. They went through two or three layers of rock that carried iron pyrites and shipped mineral, too; they passed through it finally and there was no value in it whatever.

44 Q. No body of ore?

A. No body of ore and no value whatever.

45 Q. So that a miner in sinking a shaft one day encounters most encouraging indications and within a very short space of time becomes as much discouraged?

A. That is the usual experience of miners; there is one other shaft that I can instance, started in and expected to strike mineral, what is known as the Officer shaft, where they expended something like $30,000; I do not know just the amount. They sunk that shaft about 400 feet; they drifted from the bottom; they came up and drifted at a point about 200 feet from the surface; drifted from there, made upraises, and at several different times thought they

had a discovery, but finally abandoned the work and gave it up discouraged.

46 Q. Is it or is it not a fact that in the year 1882, 1883, and 1884 it was the common accepted theory of miners in this camp that the mineral must be found with a porphyry hanging wall and limestone foot wall?

A. That was the universal idea at that time; that was as early as 1879.

47 Q. And was it not a fact that the value of a claim could not be determined until limestone was encountered?

A. It was at that time and later, up to the time I got here in 1884, that all this country above us, was that all the value
710 laid between limestone and porphyry.

48 Q. So that the discovery of a small seam of mineral, and especially of a sulphide character in the porphyry, was considered no indication of the presence of mineral?

A. It was not.

Cross-examination by E. McGinnis, Esq.:

X 1 Q. From the statements you have made of numerous sinking of shafts and in mining, it would indicate to you Leadville mining is a failure?

A. No, sir.

X 2 Q. Then there were some mines found there?

A. Yes; some very valuable mines.

X 3 Q. Did you ever hear of the A. Y. and Minnie?

A. Yes, sir.

X 4 Q. Do you know its relation and position and situation to the Col. Sellers?

A. I do.

X 5 Q. What is their relation?

A. It lays directly west—not exactly west—it lays alongside, adjoining to the westerly side.

X 7 Q. How deep did they have to go to get ore?

A. On the A. Y. they found their ore at shallow depth.

X 8 Q. What depth?

A. 200 or 250 feet, and on the west side they found it even less than 200 feet.

X 9 Q. When you say that streaks of iron pyrites in porphyry do not necessarily indicate the nearness of mineral, what do you mean by that?

A. I mean it is not necessarily evidence of mineral at all.

X 10 Q. Is it any indication at all?

A. It would not be to me.

X 11 Q. Is it to anybody else?

A. I do not know. I do not think it is.

X 12 Q. Don't you know it is so considered in the camp; was at that time?

A. At what time?

711 X 13 Q. In 1882 or 1884, when you were here?

A. In 1884 I was here.

X 14 Q. What was it in 1882?

A. I was not here.

X 15 Q. Why, when you were sinking the Moyer shaft and struck a streak of pyrites of iron, you went on?

A. We came across the same contact as the Sellers had and drifted on it; it was iron pyrites and sulphide.

X 16 Q. This very place where you got the iron pyrites, in which you were personally engaged in sinking and running through, you came across it there occasionally?

A. Yes, sir; led us to hope for mineral.

X 17 Q. Why did you hope for mineral if you didn't consider it an indication of mineral?

A. Well, it was a change, and we thought it might be mineral.

X 18 Q. Was it a favorable or unfavorable change?

A. It proved to be very unfavorable.

X 19 Q. I am talking about the time you based your hopes on it?

A. We thought it was a favorable change.

X 20 Q. You considered it was a favorable change?

A. Yes.

(Mr. PARSONS:)

X 21 Q. Is it not a fact among miners that any change in the rock or formation is always regarded as favorable?

A. It is unless it is some change which is known to be unfavorable.

X 22 Q. And are not these supposed favorable changes often delusive?

A. Very.

(Mr. MCGINNIS:)

X 23 Q. Don't great bodies of mineral give out just as well as these small indications?

A. There is a limit to all bodies of mineral.

And further witness saith not.

C. C. PARSONS, being first duly sworn according to law,
712 testified as follows:

About the 23d of July, 1882, Mr. W. F. Patrick came to my office, in the city of Leadville, exhibited to me a memorandum from the plaintiff, Frank J. Bowman, dated St. Paul, July 16th, 1882, and which has been introduced in evidence in this case, and asked me whether that was a sufficient assignment or transfer of his—Bowman's—interest in the contract that he had with the owners of the Col. Sellers and Accident claims——

(Mr. MCGINNIS:) Plaintiff's attorney objects to the witness stating his legal opinion and effect of the letter of July 16th, 1882, as not competent.

(Witness continues:) I stated to him that the acceptance of that

proposition would close the contract of purchase of the Bowman interest by him, and advised him to have a contract drawn which would embody substantially the terms of the proposition contained in that letter, and at his request I prepared the contract which has been introduced in this case. I know this fact from the photographic copy which was made in St. Louis and forwarded to me by Mr. Eliot, one of the attorneys in this case. I prepared the contract and my impression is that it was signed by Mr. Patrick in my office and enclosed in an envelope by me and handed to him. The reason why I am enable- to fix the date about the 23d of July, 1882, is that in examining my papers I find that I was at the Windsor hotel, in Denver, on the 22d of July, 1882, on my return from a trip that I had then taken to Ohio, and I recollect distinctly that the evening that I settled my bill at the Windsor hotel I took the train for Leadville and arrived here the next morning, and my recollection is that Mr. Patrick came into my office the morning that I returned from my eastern trip and exhibited the letter I have spoken of, and requested me to draw the contract, which would amount
713 to an acceptance of the proposition contained in that letter.

I would not state definitely that this was on the 23d of July, but I do recollect that it was very shortly after my return, and my best recollection is that it was the morning I returned from the East.

Cross-examination by E. McGINNIS, Esq.:

X 1 Q. Who is the A. E. Reynolds whose name is signed to that contract as attesting witness?

A. That is E. A. Reynolds. He at that time, I think, was a clerk in Judge Bissell's office and is now, I learn, the managing clerk in the office of Edward O. Wolcott, in Denver.

X 2 Q. Where was his office at the date at which you speak that that contract was made?

A. Judge Bissell's office was in the old Bank of Leadville building, at the foot of Harrison avenue, in this city.

X 3 Q. Where was your office then?

A. My office was in the Starr block, between 4th and 5th street-, on Harrison avenue, the west side.

And further witness saith not.

C. C. PARSONS.

Subscribed and sworn to before me this 31st day of December, A. D. 1887.

[SEAL.]

JAMES B. KNOBLOCK,
Notary Public.

Whereupon the taking of testimony was continued until Wednesday, Nov. 30th, 1887, at ten o'clock a. m.

On Wed., Nov. 30th, at ten o'clock a. m., at request of defendants and by agreement of counsel for the respective parties, the taking of testimony was continued until Saturday, Dec. 3d, 1887, at
714 ten o'clock a. m., at which time the taking of testimony was resumed.

Present: E. McGinnis, Esq., attorney for plaintiff, and C. C. Parsons, Esq., of counsel for defendants.

O. H. HARKER, a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by C. C. PARSONS, Esq.:

1 Q. State your name, residence, and occupation.

A. Oliver H. Harker; residence, Leadville at present, but I am just on the eve of departure; my occupation is mining.

2 Q. How long have you been engaged in the business of mining?

A. About twenty-seven years and a half.

3 Q. State where.

A. In Colorado, in Nevada; mainly in Colorado; two years mining in Nevada.

4 Q. How long have you been engaged in mining in the vicinity of Leadville?

A. About eight years.

5 Q. What positions have you held as a mining man in this camp?

A. One known as mine manager; superintendent of mines.

6 Q. What properties have you had charge of here?

A. Do you wish me to detail them all?

7 Q. Give generally the large properties you have had control of?

A. The Breece iron mine, the Yankee Doodle mine.

8 Q. Give the mines.

A. The Yankee Doodle mine, the Leadville consolidated mines, the Carbonate, the Shamrock, the Prospecting Mining Company, the Ohio, the Henrietta, the Maid of Erin, the Louisville mine, the Smuggler Mining Company, the Lilly, the Houghton Mining Company. I was originally with the Little Pittsburgh mine. I have been connected with other mines as advising and consulting man, several others.

9 Q. Are all the mines that you have named situated on Carbonate, Iron, and Fryer hills?

A. And Breece hill; yes.

715 10 Q. In the immediate vicinity of Leadville?

A. In the immediate vicinity of Leadville, Lake county.

11 Q. Are you acquainted with the formation on Iron hill in the vicinity of the Col. Sellers and Accident mines or A. Y., Minnie, and others?

A. I am.

12 Q. Have you had any experience in sinking shafts in the development of mining properties on Iron hill in the vicinity of the Col. Sellers mine?

A. I have.

13 Q. You may state between what formations the mineral on Iron hill is found.

A. The mineral on Iron hill is found between the porphyry and lime—porphyry overhanging and lime wall on the foot.

14 Q. State whether or not in the sinking of shafts for the discovery of mineral on Iron hill and in the vicinity of the Col. Sellers and Accident mines the occurrence of a seam or stringer of iron pyrites is frequent or otherwise.

A. It is frequent in the porphyry.

15. Q. Is that true of this camp generally?

A. It is true of this camp generally. You will find it almost everywhere where you penetrate the porphyry in the shaft at differences varying. Sometimes you go two or three hundred feet in depth before you reach the contact—often in this country here—which constitutes the vein and which we mine and work, and the vein seems all decomposed matter in the porphyry and carrying iron pyrites. Sometimes I have seen them where they do not carry iron pyrites, but mainly they carry a small portion of iron pyrites. It is also true that you often find the iron pyrites disseminated through the rock without being decomposed.

16 Q. Is it of frequent occurrence to find the porphyry rock that does not disclose any iron pyrites or any mineral vein that will assay something in silver?

716 A. Yes, sir; you very frequently find porphyry rock that will carry a little per cent. of silver; sometimes one per cent. and sometimes more.

17 Q. Is that true in the absence of any vein matter?

A. True in the absence of any vein matter whatever; in this sense, I mean. You find where porphyry will show a slight per cent. of silver, will give an appreciable quantity of silver in the ordinary assay, that has no connection whatever with the vein by any seam or feeder or anything of that character; just the assay of the porphyry in the mass of the mountain. Again, you will find porphyry that will not give any appreciable amount of silver by any of the ordinary processes of determining.

18 Q. Is it not true that on Aspen mountain that the country rock will assay something almost everywhere you take it up?

A. Yes, sir; it is quite true on Aspen mountain. I sunk a shaft on the — mountain about four hundred feet deep. It was quite frequent occurrence that these seams of decomposed matter showed iron myrites and assayed as high as nine ounces in silver, and we never reached the vein proper in sinking that shaft. I do not think we would in two or three hundred feet further.

19 Q. Don't the formation in sinking a shaft on Aspen mountain disclose matter that will assay something in the absence of veins or decomposed matter?

A. Yes, sir.

20 Q. Now, I will ask you if from your experience as a mining man and your knowledge of mining, and especially in view of your experience in this camp, what you consider the occurrence of iron pyrites in the porphyry or small streaks of veins of mineral that is found in the porphyry rock, what that indicates.

A. Why, if I understand the meaning of your question, what significance I would give to a seam in the porphyry containing mineral or pyrites of iron and matters of that kind?

21 Q. Yes.

A. What significance I would attach to it as a mining
717 man?

22 Q. Yes.

A. I would attach none whatever.

23 Q. Why not?

A. Because it is of frequent occurrence that in varying depths in the porphyry from near the surface down—I should say shafts in porphyry—for five hundred feet deep these seams occur in varying depths all the way in that five hundred feet. I speak from facts—my own observation. It does not indicate that we are approaching the vein or contact. Here the way we work the carbonate vein that lies between the porphyry and lime it does not indicate that we are approaching the vein when we strike the iron pyrites, and after coming to it in the Breece iron mine, even at fifty to two hundred feet deep, I had poor iron pyrites ten inches to two feet and the vein has never been reached yet. I never found, under any circumstances, in my mining experience where I sunk a shaft where a streak of pyrites in any form, whether in seams or general dissemination through the rock or whether they occurred in depositions, would indicate that we were nearing or approaching the carbonate veins here at all; attach no significance whatever to it.

24 Q. Would it add any to the value of the property?

A. None whatever, *ebcause* the mineral itself is as valueless as the porphyry which encloses it. It is a fact well known to myself and most of the mining men here that no value is attached whatever *is attached* to anything of that kind.

25 Q. Suppose that in sinking a shaft on the Col. Sellers claim you would encounter a small seam or stringer of iron pyrites at a depth of 235 or 240 feet and the stringer varying from a half inch to two and a half inches, and in sinking the shaft it should leave the shaft—go out to one side—would you attach any significance to that as indicating the near presence of any ore body?

718 A. I should not. My observation is like this: that I have never seen—I have frequently seen the seams of iron pyrites in the porphyry. I have never seen one that connected with the vein proper—ore. The iron pyrites exists in the porphyry in these seams, and you very often find it generally disseminated through it. It seems to belong to the porphyry. When the porphyry came up from below it associated with it; still remains with it in that form—in seams or general dissemination.

26 Q. Would such a seam of iron pyrites or decomposed porphyry—would it add any to the intrinsic value of the property or to its market value?

A. It would not from the fact that it is totally valueless, and it does not indicate mineral or vein that is paying mineral.

27 Q. And without paying mineral the seam is of no value?

A. Without the mineral vein the mine is of no value for that reason.

28 Q. Did you ever examine the mineral that was found in the

Col. Sellers shaft that was known as sulphide ore at a depth of about 265 feet, that was found in the summer of 1882?

A. I have seen the mineral frequently during that time and since.

29 Q. Do you know what the cost of treatment of the mineral that was found at that time was in this camp or in this market?

A. In 1882 the cost of treating a sulphide ore was from $25.00 to $30.00, is my recollection. I was largely engaged in selling ore here myself—carbonate ore.

30 Q. Would the ore of the character found in the Col. Sellers shaft in the summer or fall of 1882 be of any market value in this camp?

A. At that time?

31 Q. Yes.

A. It would be of some market value, but the cost of treatment would be so great that I do not think there was a great deal of profit in it.

719 32 Q. That class of ores were of a kind that were avoided by the smelters at that time?

A. They were avoided by the smelters of my own personal knowledge. The treatment was so high and they could get so much better ore to treat at that time that a very high price was charged for sulphide ore.

33 Q. When you were speaking awhile ago of some stringers and depositions that assayed one per cent. of silver, did you mean one ounce of silver?

A. A certain percentage?

34 Q. One per cent. of silver?

A. Assayed more. Yes; from two and three-tenths up and one ounce and an ounce and a half.

35 Q. Of silver?

A. Yes, sir.

Cross-examination by E. McGinnis, Esq.:

X 1 Q. Do you know when application for patent was made for the Louisville mine here?

A. I do.

X 2 Q. You testified in that case where there was an adverse against that patent, did you not?

A. I did.

X 3 Q. Did you testify there that a streak of iron pyrites carrying lead, carbonate of silver, was not only an indication of ore but a discovery of ore, and was it not on your testimony that the patent was granted?

A. Yes, sir; I can explain that.

X 4 Q. Now is the time.

A. The question of patent, whether the Louisville mine had made a valid location by discovery of mineral. Under the land office rules mineral is anything that had an appreciable amount of silver. They found a vein between sixty and seventy feet in the Louisville

shaft. I sunk that shaft from a depth of about sixty or seventy feet and found a seam of mineral from an inch to an inch and a half wide. Myself, Mr. Eddy, Tim. Foley, and some one, who I have now forgotten, went there, examined it, and took sam-
720 ples of that seam. Each one of us had it assayed separately, and it assayed from one and a half to two ounces in silver, and that was the testimony I gave in the land office. The question was not asked me whether it was a vein proper in this country underlying the porphyry or lime. It was solely a question to determine whether there was any mineral there whatever and whether it would assay an appreciable amount in silver and lead.

X 4 Q. And upon that testimony the patent was issued?

A. I do not know that, sir; there was a patent issued.

X 5 Q. Was not the A. Y. and Minnie, which mines touch the Col. Sellers' side-line with them, shipping sulphide ores from their property in 1882?

A. I think they were, to a small profit. I wish to state in this connection that I have no positive knowledge that they were shipping ore.

X 6 Q. That was in the summer of 1882?

A. Yes, that is my recollection; in the summer of 1882.

X 7 Q. Now, what would be an encouraging appearance of the Col. Sellers shaft before the body of mineral was struck; what would be an encouraging appearance of that shaft, say at a depth of 215 feet, to a man who was a miner of several years' experience and an assayer and not given to overstate things or being sanguine?

A. What would necessarily be the appearance of the shaft?

X 8 Q. What would be an encouraging appearance of the shaft?

A. What would be an encouraging appearance of the shaft at the depth you have mentioned, I would describe it something like this: To sink 250 feet, 250 feet through porphyry, what is ordinarily known as a porphyry overlying, or even for any distance, whether it be 100 feet or 500 feet, is usually known by a black appearance, showing the character of the porphyry. There is a general
721 appearance about that which no mining man or miner can state; he would not look for mineral in block porphyry—any porphyry of the kind that I have described. If the block porphyry in sinking the shaft should suddenly leave the shaft and there should come in its place a whitish-yellow porphyry, soft, to a certain extent decomposed, partaking of a clear whitish and yellowish, that would indicate to me that there was to be a change in the shaft and probable near approach to the contact vein or the main vein.

X 9 Q. That would be an encouraging appearance of the shaft?

A. That would be an encouraging appearance of the shaft.

X 10 Q. Now, what would be an encouraging appearance in a shaft?

A. The striking of the contact itself.

X 11 Q. Not considering the seam or stringer such as was made in the Louisville mine about which you testified?

A. No, sir; I do not think that the changes from the block porphyry—there is some intermediate changes in the block porphyry be-

fore you reach the mineral. I have stated that these changes are a sort of decomposed whitish-yellow stained matter coming from the iron which always associates with the veins here. The circulation of the water, too, would carry seams of iron some distance from the vein; the water would decompose it; the iron which is associated with the vein would color this decomposed matter; that would be more encouraging indications to my experience in sinking shafts here, and I have sunk a great many of them. I have never seen any feeder in any shaft that I have ever sunk that had any connection whatever with the vein itself. These are other indications.

X 12 Q. I want to know what would be a more encouraging appearance of the shaft.

A. To strike the top of the vein, find low-grade mineral; what you find after you pass through this decomposed porphyry, you
722 strike low-grade mineral in all probability.

X 13 Q. In other words, to a man who was an assayer and knew what ore was?

A. I will also state that I am an assayer and speak advisedly.

X 14 Q. And who was an experienced miner of several years' experience and in charge of sinking that shaft, watching the developments all the time, would be at a depth of 215 feet or just above that depth a very encouraging appearance?

Objected to as not a proper question to put to the witness, as being argumentative and is not proper cross-examination, and as calling for an opinion of the witness as to what would appear encouraging to some other person.

(The last foregoing question was repeated.)

A. The absence of block porphyry, the appearance of decomposed stained porphyry and carrying a small amount of silver, what is usually designated as a low-grade ore.

X 15 Q. Then there could be such a very encouraging appearance in the shaft at the depth I have mentioned in my former question and there be no amount of iron pyrites carrying silver in it?

A. There could be a very encouraging appearance of the shaft and not carrying any iron pyrites in it; now, I wish to state something further; I wish to state further that it is a frequent occurrence that we find just exactly what I have described here, the absence of block porphyry, the appearance of decomposed colored porphyry, and still go into porphyry again and not find the mineral finally, and of very recent date in the Satellite shaft I supposed I had the contact, and I found by actual measurement I was still forty feet from the contact.

X 16 Q. Is it not also true that you go into great bodies of ore and the mine sells for a large price and everybody believes
723 that they have a fine mine and it subsequently turns out that the mine is of no value at all and the money spent on it is lost?

A. Your question is that you frequently find large bodies of ore——

X 17 Q. I did not say that.

(The last foregoing question was repeated.)

A. In answer to that question, it is rather peculiar, but I do not know. My recollection—I am going to answer the question this way; if not correct, I will answer some other way: I do not know of any mine in Leadville—my present recollection—that has found a large body of mineral in the carbonate contact which has been sold and afterwards suddenly proving to be of no value whatever. No; there may be such a one, but I do not recollect. I want to answer the question just as fair as I possibly can.

X 18 Q. Then you say there have been no failure in mines in Leadville after everybody believed they had a good mine?

A. Possibly there may have been sales for certain amounts of money and the mine was not worth the amount of money paid for it. That is of frequent occurrence.

X 19 Q. Are not there a number of abandoned mines here that nothing has come out of at all?

A. There are a great many claims here that have been worked upon and a good deal of money spent, supposed to be valuable property, that have not proved so far to be valuable.

X 20 Q. Were not they developed to an extent that such a showing was obtained that ores were shown?

A. I think that is very likely, but I do not know as I believe that to be the case.

X 21 Q. You are about to leave Leadville, are you not?

A. Yes, sir; temporarily.

X 22 Q. These various mines that you have worked on—some of them are failures, are they not?

A. I do not now recollect, sir, that any mine I have been
724 connected with but what has paid something—paid dividends. Now, I do not know in what sense you mean a failure. I can make this statement, that I do not believe now that some of them are worth any amount of money. Some ore is extracted yet. There are mines that are practically worked out. Usually they don't employ men to manage mines that are practically worked out.

X 23 Q. But you worked on some that there were streaks, such as you got in the Louisville, have not paid anything at all?

A. I did not follow that streak, sir.

X 24 Q. I mean to say mines that you have worked on.

A. I do not think that I worked on any mines in Leadville that *is* entirely abandoned yet: they are worked at present and make some money; but in the larger sense, that they are paying dividends. that is different.

X 25 Q. And in all these mines in which you followed up these indications of iron pyrites something has been discovered at some depth?

A. They have always discovered mineral at some depth.

Redirect examination by C. C. PARSONS, Esq.:

1 Q. Is it not true that patents are granted for a large number of mining claims that can show no discovery of mineral whatever?

A. Yes, sir.

2 Q. And is it not a frequent occurrence that patents are granted where there is simply a small deposit or seam or stringer of low-grade ore?

A. Yes, sir; that was exactly the case with the Louisville mine; it was simply a question for the consideration of the land office, and I wish to make this statement because personally I appear here as a witness in the case, and as the question was brought up as to my testimony it was the only question in the land office; we were to see whether there was any mineral carrying silver, gold, or lead—
725 valuable mineral within the limits of that claim. This seam was used, careful samples were taken by different men—myself among the number—and tested by the different assayers, and the results testified to in the land office here solely on the question as to whether there was any valuable mineral lode within the boundaries of that claim.

3 Q. So that there may be a sufficient discovery upon which to base a location and which will disclose no pay mineral?

A. And which will disclose no pay mineral.

4 Q. And add no value to the claim except for the purpose of securing a valid location?

A. Except for the purpose of securing a valid location; the instructions were specific in the Land Office on that matter; afterwards a regular vein was discovered in the Louisville by sinking the shaft a greater depth.

5 Q. You have been asked if large sums have not been paid for mines which subsequently turned out to be valueless; is it not true that mere prospects have been sold for large sums of money which turned out afterwards to be valueless?

A. Yes; it is true both ways; it frequently happens that a prospect has been sold for a large sum of money and the man selling it hadn't a good opinion, but afterwards it turned out to be a valuable property, and I cite in proof of that the Chrysolite mine Thatcher sold to Tabot, and under just such circumstances, and it turned out to be one of the most valuable claims in the camp, and again claims were sold for large sums which did not prove to be worth anything, in which the sellers were correct. It happens all sorts of ways.

6 Q. You were asked what is an encouraging appearance in a shaft. I will ask you as a miner if any change in the formation is not an encouragement.

A. It is generally considered so by men who are sinking shafts that any very marked change in the shaft would indicate
726 something new; it is not always clearly—it cannot be clearly defined what it would indicate, but they look upon it as an encouraging circumstance.

7 Q. Is it not true that if the porphyry should be heavily iron-stained that that would also be an encouraging circumstance?

A. Yes; that is an encouraging circumstances always, passing through block porphyry and going into iron-stained porphyry. It shows the presence of iron, the iron coming from the mineral associated with the veins here.

8 Q. I will ask you to state whether or not in your experience as a miner that all these encouraging signs, such a- a change in the formation, change from block porphyry to heavily iron-stained porphyry, and various other changes, such as decomposed porphyry, are not often delusive, and, while they may for the time being encourage, if they do sometimes prove to be delusive.

A. They do. I will say this, Mr. Parsons, that in order to reach any portion of the vein in Lake county here this main contact vein, carbonate vein, underlying the country here in which we mine and has made Leadville what it is, you have to sink through the porphyry in order to reach these veins. The porphyry overlies it vertically with hardly any exception worth while speaking of. Now, there are two cases where shafts are sunk, the case of the Maid of Erin shaft on the Henrietta mine that we did not find any change at all until we got right on the ore itself, and with the exception of the porphyry overlying the ore there was no stained appearance of the porphyry nor no decomposed appearance. We went immediately from the block porphyry into the silicious matter with it, silicious rock, and then immediately into the vein. Now, it is not always true that in approaching a vein that you come to this red decomposed or iron-stained porphyry. This was a place it looked almost like poor silica and went immediately into the vein.
727 It is an exception, you know, to the general rule, and the general rule is that we find the iron-stained porphyry. Sometimes you do not go into the vein where it is four or five feet away, where you actually come into the porphyry, and a very recent occurrence is the Rose Emmett shaft. It went into seven feet of black bituminous slate just as black as it can be; now, we went into porphyry about fifteen or eighteen feet and are now just in the top of the vein proper.

(Mr. McGINNIS:)

9 Q. But the rule is otherwise, that you go from this decomposed iron porphyry into the vein?

A. I didn't speak of this last matter as being exceptional hardly; you will find it a great many times, and equally as great many times you find the decomposed matter to go right into the vein. I spoke of the Henrietta shaft as an exception.

(Mr. PARSONS continues:)

10 Q. Did you state that you thought the A. Y. and Minnie mines shipped sulphide ores in the summer of 1882? Do you know that of your knowledge?

A. They shipped carbonate ores.

11 Q. No sulphide ores?

A. Yes, sir; I have seen the mineral; the A. Y. shipped carbonate ore. Yes; I was working the Smuggler claim, lying in the immediate vicinity, and they were shipping carbonate ore all the time; saw it every day.

12 Q. Have you any knowledge of their shipping sulphide ores in the summer of 1882?

A. I have no personal knowledge of their shipping sulphide ores at that time. I know they shipped carbonate mineral, because I passed by the mine every day; it was a year or two years after that, I think, they shipped sulphide ores. I seen it there. I seen it some time after.

And further witness saith not.

JOHN D. DRUMMOND, a witness on behalf of the defendants,
728 being first duly sworn, testified as follows:

Direct examination by C. C. PARSONS, Esq.:

1 Q. State your name, age, residence, and occupation.

A. I am forty-three years of age; occupation, miner; reside in Telluride, Colorado.

2 Q. How long have you been engaged in mining?

A. Twenty-two years.

3 Q. Where?

A. Georgetown, Black Hawk, Central, Boulder, Park county, Leadville, San Juan.

4 Q. In Colorado?

A. All in Colorado.

5 Q. Have you ever mined in any other State?

A. No, sir.

6 Q. How long did you mine in Leadville?

A. Since 1879, up to the 14th day of last June a year ago.

7 Q. Are you acquainted with the defendant William F. Patrick?

A. Yes, sir.

8 Q. Are you acquainted with the plaintiff, Frank J. Bowman?

A. No, sir; I am not.

9 Q. Did you, as a contractor, sink the shaft on the Col. Sellers mining claim, situate on Iron hill, in this county?

A. Yes, sir.

10 Q. When did you commence that work?

A. I took the contract from Mr. Patrick on the 16th day of March, and on the 17th of March I had taken my tools up. The ground was frozen very hard, and I built a fire on the ground to thaw it out, and goes back on the 18th, and there was a regular mob there and told us not to go to work; that they would not allow it; so I came down to town then and informed Mr. Patrick of the situation, and he arrested the parties, and while under arrest the same day I goes back to resume the work and continued uninterruptedly, with the exception of threats and intimidations, no violence, until I had

sunk one hundred feet. That was the contract, and after it
729 was finished I came down-town to get a settlement. I didn't see Mr. Patrick that evening. I went back up the next morning. The shaft was blown up. Probably there was twenty-five or thirty feet of it. The collar blown off of it, and I came down and told Mr. Patrick of what happened.

11 Q. Was the shaft timbered at the time it was blown up?

A. Yes; with square timbers.

12 Q. What was the effect of it on the timbers?

A. It blowed them all to pieces; it blowed some of them clear across on Rock hill.

13 Q. Is that Rock hill across the gulch?

A. Yes.

14 Q. After that what did you do?

A. Mr. Patrick was in a quandary for about a week; didn'tknow what to do and talked of stopping; it was uncertain, if the sinking the shaft in taking the chances with the jumpers should be continued with.

15 Q. Were you then engaged in a contest with the jumpers for mineral, in a race for mineral?

A. We understood it, each party, that the one who reached mineral first would have the right to the ground.

16 Q. How many shifts of men were you working at that time?

A. For the first hundred feet we didn't work but two.

17 Q. How many after that?

A. Three.

18 Q. Three shifts of eight hours each?

A. Yes, sir.

19 Q. Were the jumpers working at this time?

A. Yes, sir.

20 Q. State who were associated with you in the different contracts that you had with Mr. W. F. Patrick in the sinking of that shaft.

A. The first hundred feet I had taken myself and then took in a partner, Tom Dunn, in the next hundred feet; the contract was given to I and Tom Dunn and then we had taken in a third man, Bob Wood.

21 Q. Were you in charge of the sinking of the shaft from
730 the surface to the depth of 265 feet?

A. Yes, sir.

22 Q. And how much further?

A. Well, till we sunk it to the depth of 400 feet.

23 Q. State what depth, if you know, in the sinking of that shaft you first encountered anything that resembled mineral.

A. 230 or 235 feet was the first thing that I ever saw in the shaft that looked like mineral, and that was a cle-vage in the rock—a seam—little stringer probably an inch and a half, probably may have been two inches, wide.

24 Q. What was the character of that stringer or seam?

A. It was pyrites of iron and a little white talc in it.

25 Q. Now, state, if you know, at what point in the shaft this seam that you have described was encountered.

A. 235 feet.

26 Q. You may state whether or not in sinking the shaft you followed this seam of mineral that you have described or whether you went through it and kept on sinking perpendicularly.

A. We didn't pay any attention to it; went right on down.

27 Q. Why not; why didn't you pay any attention to it?

A. Well, we didn't think that it was worth while to pay any attention to it.

28 Q. Did not you think it was of any value?

A. No; none whatever.

29 Q. You say this seam that you have described was entirely in the porphyry rock?

A. Yes, sir.

30 Q. Was it block porphyry?

A. Yes, sir.

31 Q. Can you fix the date on which you encountered the little seam of iron pyrites that you have described in that shaft?

A. Between the 14th—I will say it was the 14th or 15th. I could not say positive.

32 Q. Of what month?

A. Of August, 1882.

33 Q. About the 14th or 15th, you think?

A. Yes, sir.

731 34 Q. Now, you may state what the formation was after you left this stringer of iron pyrites and in your downward course in the sinking of that shaft.

A. Well, it was block porphyry for twenty-five feet below it.

35 Q. Below that?

A. Yes, sir.

36 Q. Then what was the next change in the formation?

A. Well, it was a kind of whitish porphyry, a little decomposed.

37 Q. And then what?

A. And then we got the mineral.

38 Q. What was the character of the mineral that you struck in the shaft after leaving the block porphyry and got into the decomposed porphyry?

A. It was pyrites of iron and zinc, carrying a small per cent. of lead.

39 Q. What is the name of that kind of ore?

A. Sulphide.

40 Q. Is it low grade and refractory?

A. That is, sir.

41 Q. At what depth did you reach this low-grade refractory ore that you have described in the Col. Sellers shaft?

A. 265 feet.

42 Q. Did you strike water at the same time?

A. Yes, sir.

43 Q. In what volume?

A. Well, I could not state how much there was of it. I run a

hoister on it for about three hours and kept gaining on me. It raised over twelve feet and found its level. The bucket would not move it at all.

44 Q. Was there a large or small quantity of water?

A. I should say it was a very large body. I could not handle it. If I had any way of handling it I could tell how much it was.

45 Q. What means did you have to control that water from the 30th of August, when you struck this mineral, until you were able to control it?

A. We put in a No. 5 Cameron steam pump and that had no effect upon it. They went to work and put in a six-inch Cornish pump, run with a steam head, and that didn't do any good—that was throwed out—and then the management put in a ten-
732 inch Cornish pump, two ten-inch Cornish pumps, and the 1st of March, 1883, we got to the bottom.

46 Q. You got the water down to the bottom of the shaft?

A. Yes; I never saw the bottom from the 30th of August (1882) to the 1st of March.

47 Q. Do you mean to say that you never saw the bottom of the shaft when mineral was struck, from the time it was struck, on the 30th of August, 1882, to the 1st of March, 1883?

A. That is my recollection.

48 Q. Why was it you could not get to the bottom?

A. On account of the water; we could not handle it.

49 Q. Were you fighting the water from the time you struck mineral, on the 30th of August, 1882, until the 1st of March, 1883?

A. All the time, day and night.

50 Q. So that between those two dates that I have mentioned you could not ascertain the extent or quality of the ore body by a personal examination?

A. No, sir; you could not.

51 Q. What enables you to fix about the 14th of August, 1882, when you encountered the little stringer of iron pyrites that you have described in the shaft at the depth of 235 feet?

A. I approximate that by the amount of feet we sunk and the date. On the 30th of August my contract expired, and we made about two feet a day. That would leave thirty feet to drive after 235 feet, and after the 30th of August my contract expired with Mr. Patrick on account of getting more than eight buckets an hour. If I had got nine buckets an hour I would have thrown the contract up; and on the 30th day of August I came down and demanded my money on account of the contract having expired, and they could not pay me much earlier or much later that that. About two feet a day is what we made; so that would fix the date about the 15th.

733 52 Q. Do you know when the jumpers reached the ore body in their shaft?

A. Yes; I do.

53 Q. When was that?

A. But I could not tell now; it must have been two months later.

Cross-examination by E. McGINNIS, Esq.:

X 1 Q. Where are you stopping in Leadville at the present time?

A. I have no particular place; I stay around with my friends.

X 2 Q. With what friend are you stopping?

A. At present and have been for a day or two with a man by the name of Stett.

X 3 Q. Is that the Stett who was time-keeper on the Col. Sellers mine in June and July, 1886, who was accused of making false pay-rolls?

A. That is him.

X 4 Q. Were you superintendent of that mine a short time before that time?

A. I do not know when that occurred. I was up there on the 14th day of June, 1886.

X 5 Q. You know of the fact that he had been discharged from the mine and these charges made against him?

A. No, sir; I do not.

X 6 Q. You never heard that before?

A. I heard of it, but do not know anything about it.

X 7 Q. When did you hear of it?

A. I heard of it last August.

X 8 Q. There were some fictitious names on the pay-roll?

A. I heard so.

X 9 Q. And the only question was, Who was in it? There was no dispute about the fact of there being fictitious time-checks.

(Mr. PARSONS:) I object to all inquiry about fictitious time-checks as totally irrelevant and immaterial, as not in issue raised by the pleadings in this case.

734 (The last foregoing question was repeated.)

A. Well, I was told that there was fictitious time-checks issued, but I know nothing about them because it occurred long after my time.

X 10 Q. When did you first become acquainted with William F. Patrick?

A. I believe it was about the 12th of March, 1882.

X 11 Q. Were you with him in the Aftermath?

A. No, sir.

X 12 Q. You commenced with him on the Sellers?

A. Yes, sir.

X 13 Q. You and he went out of the Col. Sellers management in the summer of 1886; you went out in June and he in September?

A. Yes, sir.

X 14 Q. Since that hav'n't you been with him in the management of the Gold King mine?

A. I have been working for him; yes.

X 15 Q. And are you not both out of the management of that mine now, and other parties in your places?

Question objected to as being immaterial and irrelevant and has nothing whatever to do with this case.

(The last foregoing question was repeated.)

A. I am not aware of the fact.

X 16 Q. Of what?

A. That we are both out.

X 17 Q. Are you out?

A. If I am I have not been informed of it.

X 18 Q. When did you do work there last?

A. The 10th of last month.

X 19 Q. Why are you not working now?

A. Simply because I am in Leadville. I do not have to stay on any mine continually that I ever worked for.

X 20 Q. Don't you know that John Kelly is in charge of that mine?

A. I do not.

X 21 Q. Do you claim that you are engaged under him on that mine?

A. I claim Mr. Kelly is not there.

735 X 22 Q. Don't you know that he is manager of the mine now?

A. I do not.

Objected to for the same reasons as last above stated.

X 23 Q. Did you keep any written memorandum of the dates at which any ore was discovered in the Col. Sellers shaft?

A. I did.

X 24 Q. Have you got that written memorandum?

A. I have not.

X 25 Q. Where is it?

A. It is burned up in the old shaft-house when it burned down.

X 26 Q. When was it burned up?

A. Burned down on the 17th of March, 1883.

X 27 Q. So you depend now on your recollection entirely as to these depths and things; you have no written memorandum at present?

A. It is a positive fact I commenced on the 17th of March.

X 28 Q. I am not asking about that; I am asking about the depth of the shaft when ore was discovered. Did you have a written memorandum of that?

A. Yes; I did.

X 29 Q. Why would you keep a written memorandum of that?

A. Well, simply because I kept the time books.

X 30 Q. What had the discovery of ore to do with your keeping a time book?

A. It is natural to anybody to make a note of anything discovered.

X 31 Q. The only book you had, then, was a time book?

A. A memorandum, as I kept it.

X 32 Q. Now, I will ask you—you say that memorandum was destroyed as far back as 1883?

A. 1883.

X 33 Q. More than four years ago?

A. Yes.

X 34 Q. How deep is that shaft timbered; the timbers commence at the top and go down to what depth?

A. 400 feet.

736 X 35 Q. So the shaft is timbered now from the top down to a depth of 400 feet?

A. Yes, sir.

X 36 Q. This seam or stringer of ore that you say you discovered in that shaft. How thick was it, how wide was it?

A. Well, it extended half the width of the shaft, and I did not—I could not state positively, but it would not exceed two inches and maybe not more than an inch and a half.

X 37 Q. In what?

A. In width.

X 38 Q. Was it a seam running up and down the length of the shaft or running across the shaft or running parallel?

A. Parallel.

X 39 Q. Parallel to the surface of the shaft?

A. Yes, sir.

X 40 Q. Now, how thick was that seam from the top to the bottom of the seam?

A. Well, my recollection is it was uniform about an inch and a half.

X 41 Q. How wide was that seam from side to side of the seam?

A. It only showed in one side of the shaft; we did not follow it and could not tell anything about the extent of it.

X 42 Q. And only showed in one side of the shaft?

A. Yes.

X 43 Q. Did it ever extend entirely across the shaft?

A. I do not think it did.

X 44 Q. How near did it extend across?

A. I think probably a foot and a half on one end, and extended, I should think, probably three feet across the shaft on the other end, so it was simply in one corner of the shaft.

X 45 Q. It never did go entirely across the shaft?

A. Never.

X 46 Q. I will ask you if it was this seam—did it first come in in one corner of the shaft looking like a small — in porphyry, this seam that you are now talking about?

A. No, sir.

X 47 Q. And then did it widen out and extend a clearly
737 defined mineral vein entirely across the shaft?

A. It did not.

X 48 Q. That is, not this one; the one that I am talking about is not the seam that you are talking about; is that your answer?

A. The seam I am talking about is the one I have described in one corner of the shaft.

X 48 Q. It didn't extend across the shaft?

A. It did not.

X 49 Q. The seam that extends across the shaft or body of ore, whatever you call it, was found at a lower depth?

A. Yes.

X 50 Q. How great was the difference in time between the seam that you are talking about and the one that extends entirely across the shaft?

A. What is the depth from one to the other?

X 51 Q. No, no; the time; how long in time, about?

A. Fifteen days.

X 52 Q. So before you discovered the seam of ore extending entirely across the shaft fifteen days you struck the seam you talk of coming in part of the shaft?

A. Thirty feet above; yes.

(Mr. PARSONS:)

X 53 Q. Are you not mistaken about the fire on No. 1 shaft described occurring in 1883?

A. I would not state positive; I know it was the 17th of March, though.

(Mr. PARSONS:)

X 54 Q. Was it not in 1884, while Patrick was in San Francisco?

A. Mr. Patrick was in San Francisco.

(Mr. PARSONS:)

X 55 Q. Don't you know that in March, 1883, you just commenced to ship mineral?

A. That is right; I will correct that to 1884, because I know that I telegraphed Patrick in San Francisco.

(Mr. PARSONS:)

X 56 Q. Do you know what caused that fire?

A. It was done by the heating of the dressing-room, where I believe the fire originated from.

(Mr. PARSONS continues:)

X 57 Q. And you say your books and memorandum that you kept at the time of the sinking of the shaft was burned up in that fire?

A. Everything was destroyed.

738 X 58 Q. You were asked about fictitious time-checks, of which a man by the name of Stett was charged. I will ask you if the discovery of any such thing and such charges were not made some time after you quit the mine.

A. Yes; when I was in Telluride.

X 59 Q. Was Stett an old acquaintance of yours?

A. I had known him quite a little before he went to work for me.

X 60 Q. And while you were stopping here you *are* boarding at his house?

A. Yes.

X 61 Q. You say you have not been discharged from the Gold King mine?

A. I have not been informed.

X 62 Q. Do you expect to return there?
A. I expect to return this evening.
X 63 Q. For the purpose of continuing your employment for that company?
A. Yes, sir; until I am informed to quit.

(Continued by Mr. McGINNIS:)

X 64 Q. You are going to do that so as to put yourself in a position you are ready to continue so as to claim pay for the time that you have not been working?
A. No; I will work until they want me to quit.

(Mr. PARSONS:)

X 65 Q. Do you make any claim against the company for the time that you spend here?
A. Certainly not.

And further witness saith not.

JOHN D. DRUMMOND.

Subscribed and sworn to before me this 3d day of December, A. D. 1887.

JAMES B. KNOBLOCK,
[SEAL.] *Notary Public, Lake County, Colo.*

Whereupon the taking of testimony was continued to December 3d, 1887, at two o'clock p. m. of said day.

739 December 3d, 1887, at two o'clock p. m., the taking of testimony was resumed.
Present: E. McGinnis, Esq., counsel for plaintiff, and C. C. Parsons, Esq., of counsel for defendants.

ALFRED H. BOYD, a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct examination by C. C. PARSONS, Esq.:

1 Q. State your name, age, residence, and occupation.
A. A. H. Boyd is my name; thirty years of age.
2 Q. And occupation?
A. I am a mechanical engineer; residence, Leadville.
3 Q. How long have you resided in Leadville?
A. Since 1879.
4 Q. Are you acquainted with the defendant William F. Patrick?
A. Yes, sir.
5 Q. Are you acquainted with the plaintiff, Frank J. Bowman?
A. No, sir.
6 Q. Did you know Lyman Robison and Theodore C. Stebbins, known and commonly called Charley Stebbins?
A. Yes, sir.
7 Q. Did you know them in the summer of 1882?
A. Yes, sir.

8 Q. What work were you engaged in during the months of June July, and August, 1882?

A. I was guarding on the Col. Sellers mine.

9 Q. What do you mean by guarding?

A. We were employed there to keep the jumpers from coming up and taking possession of the shaft.

10 Q. Do you mean by the jumpers or parties who were claiming under the Little Hope location?

A. Under the Little Hope location.

11 Q. Were you in attendance upon the Col. Sellers shaft
740 daily during the months of July and August, 1882?

A. Not in the day—at night-time.

12 Q. Did you have knowledge of the daily developments in the Col. Sellers shaft during the months of July and August, 1882?

A. Yes, sir.

13 Q. You may state whether or not there was any vein or mineral of any description encountered in the sinking of said shaft during the month of July, 1882.

A. I seen nothing but block porphyry come out of the shaft; forest rock; I suppose it is the same rock.

14 Q. Did you watch the dump from day to day?

A. I watched the buckets of dirt as they came up, throwed at the end of the shaft-house inside; it was dumped in there and shoveled out.

15 Q. Do you know when anything resembling mineral was first encountered in that shaft?

A. Along in the month of August.

16 Q. About what time in the month of August?

A. I should judge about the middle of August—somewhere during that time.

17 Q. Did you see it when it was first encountered?

A. Yes, sir; I went down the mine; I was the first one that went from the surface to see it.

18 Q. You were the first one?

A. The first one; it was at night-time when it was struck.

19 Q. What was the formation in which it was found?

A. Well, I can say what was under it and above; it was forest rock or block porphyry; forest rock, some people call it.

20 Q. Sometimes called country rock, is not it?

A. That I can't say.

21 Q. It was block porphyry.

A. Yes; block porphyry.

22 Q. Did you ever measure it to ascertain the extent of it?

A. No, sir; I never did.

741 23 Q. You know nothing about the value of it?

A. No, sir.

24 Q. Nor the extent of it?

A. Nor the extent.

25 Q. Were you employed in guarding the Col. Sellers shaft at the time that mineral was encountered at a depth of 265 feet on the 30th of August, 1882?

A. I was guarding on the mine when this stuff called ore— (interrupted).

26 Q. I mean after you found this first little stringer of iron pyrites?

A. That was in 1883.

27 Q. You mean the last strike was in 1883?

A. What I saw was what they first encountered.

28 Q. You never saw the thing after that?

A. Not after that until they struck it the following year.

29 Q. Was that the time you put in the Cornish pump?

A. Yes.

30 Q. That was in the spring of 1883, was not it?

A. That was in 1883.

31 Q. You put in the Cornish pump for them?

A. No; I did not put it in. I was there to start it. I put in the hoisting engine and machinery.

32 Q. Then you never seen anything from the shaft from the time that they first encountered this little stringer of iron pyrites in the shaft about the middle of August, 1882, until the spring of 1883?

A. No, sir; I was not down the shaft during that time until after they commenced shipping ore in 1883.

33 Q. Have you any means by which you are enabled to state definitely that there was no ore encountered in that shaft during the month of July, 1882?

A. Yes, sir; I have a paper now. It is a transfer of an interest in a lease to me dated September 13th; I think it is September 13th. (Witness produces lease.)

(By Mr. McGINNIS:)

34 Q. Of what year?

A. September 13th, 1882.

(Mr. PARSONS continues:)

742 35 Q. How does that enable you to state?

A. It was along about the 1st of September that I left the Sellers mine and looking for this lease and starting to work, Mr. Simmons and myself and some other parties, and I know that was just a short time before that that they struck this ore in the Sellers.

36 Q. And was that the first ore they got?

A. That was the first indications of ore.

Cross-examination by E. McGINNIS, Esq.:

X 1 Q. Mr. Boyd, you say you were down the shaft and saw that ore?

A. Yes, sir.

X 2 Q. When you got down there what did you find?

A. I found some black shaley stuff—pyrites.

X 3 Q. Were you ever down that shaft before that?

A. Yes; I was down after it was blowed up.

X 4 Q. How long after it was blown up?

A. Well, I should judge it was——

X 5 Q. That is, how long after it was blown up before you went down?

A. That is hard to state; I do not know.

X 6 Q. Within a day or two?

A. No; it was later than that.

X 7 Q. A week?

A. I should judge it was two or three weeks.

X 8 Q. Were you down any other time between that time and the time you went to see this ore?

A. No, sir.

And further witness saith not.

(Mr. McGINNIS:) The signatures of all the witnesses taken in November and December, 1887, are waived, except the signatures of William F. Patrick, James M. Patrick, and J. D. Drummond.

Which stipulation was agreed to by C. C. Parsons, Esq.

743 STATE OF COLORADO, } ss:
County of Lake, }

I, James B. Knoblock, a notary public in and for said Lake county, in the State aforesaid, do hereby certify that the witnesses Alfred H. Boyd, John D. Drummond, O. H. Harker, C. C. Parsons, William F. Patrick, James M. Patrick, Lyman Robison, and Frank G. White, in the foregoing depositions named, were each by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that said depositions were so taken, beginning on the twenty-first day of November, A. D. 1887, at the hour of ten o'clock a. m. of said day, and the taking thereof continued from day to day by agreement of counsel, as hereinbefore appears, to and including the third day of December, A. D. 1887.

I do further certify that upon the taking of said depositions the same were by me reduced to short-hand writing upon oral interrogatories propounded to said witnesses by C. C. Parsons, Esq., of counsel for defendants, and by E. McGinnis, Esq., of counsel for the plaintiff, and were afterwards transcribed and extended upon the typewriter, as hereinbefore appears; and the depositions of the witnesses John D. Drummond, William F. Patrick, James M. Patrick, and C. C. Parsons were by them read over, and, being first by them respectively corrected, were by them and each of them subscribed and sworn to in my presence, and that by stipulation of counsel the signatures of the witnesses Alfred H. Boyd, O. H. Harker, Lyman Robison, and Frank G. White to their said depositions were specially waived by counsel for the respective parties; and I further certify that said depositions are true and correctly transcribed.

I do further certify that at the taking of said depositions E. McGinnis, Esq., appeared as counsel for the plaintiff and C. C. Parsons,

744 Esq., appeared as counsel for the defendants, and the times of taking the testimony aforesaid were agreed upon by said counsel respectively, and that the stipulations appearing in the foregoing testimony were made, entered into, and agreed upon by counsel for the respective parties.

I do further certify that the exhibits which were introduced by defendants, marked Defendants' Exhibits, from the letters "A" to "Q," both inclusive, consecutively, were copied into the record in their order, and are true and compared copies of said exhibits, and by agreement of counsel for the respective parties the original exhibits aforesaid were by me mailed to Cunningham and Eliot, attorneys for the defendants, resident in St. Louis, Mo., to be by them used and filed in this cause; that the exhibits introduced by plaintiff on cross-examination, being marked Plaintiff's Exhibits "A" to "G" on Cross-Examination, are hereto attached and made a part hereof.

I do further certify that I am neither of counsel nor kin to any of the parties to this suit and have no interest whatever in the result thereof.

In witness whereof I have hereunto subscribed my name and affixed my seal of office this twenty-fourth day of January, A. D. 1888.

JAMES B. KNOBLOCK,
[SEAL.] *Notary Public, Lake County, Colo.*

To transcribing 1086 folios of testimony and depositions, at 20 cents per folio	$217 20
To four days' taking testimony in short-hand, including swearing of witnesses and all services as notary, at $10.00 per day	40 00
	$257 20

Received payment of the defendants.

JAMES B. KNOBLOCK.

745 PLAINTIFF'S EXHIBIT "A" ON CROSS-EXAMINATION.

LEADVILLE, *May* 24, 1882.

Received of W. F. Patrick one hundred dollars (100) on account engine, hoister, tools, &c., from Henrietta claim, near Robinson, Summit Co.; balance, three hundred dollars, to be paid when machinery is at the depot in Leadville.

I. V. SKIDMORE.

PLAINTIFF'S EXHIBIT "B" — CROSS-EXAMINATION.

No. 19. LEADVILLE, COLO., *May* 25, 1882.

The Bank of Leadville pay to Geo. W. Chase or order eighty-five .78 dollars.

$85.78. W. F. PATRICK.

[On margin:] Corner Harrison avenue and Chestnut street.
[Written across the face:] Paid May, 1882. Bank of Leadville, Leadville, Colo. (2.)
Endorsed: Geo. W. Chase. For our deposit only. Ralph & Bergerman.

PLAINTIFF'S EXHIBIT "C" — CROSS-EXAMINATION.

No. 20. LEADVILLE, COLO., *May* 27, 1882.

The Bank of Leadville pay to I. V. Skidmore or order two hundred dollars.
$200.00. W. F. PATRICK.

[On margin:] Corner Harrison avenue and Chestnut street.
[Written across the face:] Paid May 29, 1882. Bank of Leadville, Colo. (1.)
Endorsed: I. V. Skidmore.

PLAINTIFF'S EXHIBIT "D" — CROSS-EXAMINATION.

No. 21. LEADVILLE, COLO., *May* 29, 1882.

The Bank of Leadville pay to J. C. Carlon or bearer twenty dollars.
$20. W. F. PATRICK.

[On margin:] Corner Harrison avenue and Chestnut street.
[Written across the face:] Paid May 29, 1882. Bank of Leadville (1), Leadville, Colo.
Endorsed: J. C. Carlon

746 PLAINTIFF'S EXHIBIT "E" — CROSS-EXAMINATION.

No. 36. LEADVILLE, COLO., *June* 27, 1882.

The Bank of Leadville pay to I. V. Skidmore or order twelve .50 dollars.
$12.50. W. F. PATRICK.

[On margin:] Corner Harrison avenue and Chestnut street.
[Written across the face:] Paid June 28, 1882. Bank of Leadville (1), Leadville, Colo.
Endorsed: I. V, Skidmore.

PLAINTIFF'S EXHIBIT "F" — CROSS-EXAMINATION.

Wm. F. James, pres't. Wm. K. Burchinell, treas.

LEADVILLE, COLO., *May* 22*nd*, 1882.

Know all men by these presents that I have this day sold to W. F. Patrick one engine, hoister, and boiler complete, with tank and fixtures, for the sum of four hundred dollars cash, the receipt of

which I hereby acknowledge, $400.00. The above machinery is taken from the Henrettia mine of Kokomo.

I. V. SKIDMORE.

Witness: JOS. F. TUMALTY.
" J. C. CARLON.

PLAINTIFF'S EXHIBIT "G" — CROSS-EXAMINATION.

No. 39. LEADVILLE, COLO., *June* 28, 1882.

The Bank of Leadville pay to T. H. Dunn or order nine hundred & eighty-one .05 dollars.

$981.05. W. F. PATRICK.

[On margin:] Corner Harrison avenue and Chestnut street.

[Written across the face:] Paid June 29, 1882. Bank of Leadville (1), Leadville, Colo.

Endorsed: T. H. Dunn. Jdfd. by Campbell.

747 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

FRANK J. BOWMAN
vs.
WILLIAM F. PATRICK *et al.* } No. 2732. In Equity.

Testimony on behalf of the defendant before L. L. Walbridge, special examiner, taken at St. Louis December 19th, 1887, and subsequent days to which the hearing was adjourned, at the office of Messrs. Cunningham & Eliot, attorneys for the defendant-, Bank of Commerce building, city of St. Louis.

Present: On behalf of the plaintiff, E. McGinness, Esq.; on behalf of the defendants, Messrs. Cunningham & Eliot.

H. D. LAUGHLIN, being duly sworn on behalf of the defendant-, testified as follows:

(By Mr. CUNNINGHAM:)

1 Q. Please state your name, age, residence, and occupation.

A. My name is Henry D. Laughlin; my age is nearly 40; my residence, St. Louis, and my occupation, lawyer.

2 Q. How long have you practiced law here in St. Louis?

A. Since the spring of 1869.

3 Q. Are you of counsel for the complainant in this case?

A. I am.

4 Q. How long have you been of counsel in this case for the complainant?

A. I can't remember the date, but suppose since shortly after the case was transferred to the Federal court; perhaps in February or March.

5 Q. Are there any facts, Judge, which would enable you by

reference to them to fix the time more certainly at which
748 you became counsel for the complainant?

A. No recorded facts that I remember now. It was not very long before I was called upon to make search for certain letters in the building then occupied by Col. Fordyce on Grand avenue.

6 Q. This case was removed to the Federal court in October, 1886, I believe. Now, assuming that to be a correct statement of the date of removal, could you indicate the month in which you became interested in the case as of counsel for the complainant?

A. Well, then, I would say in the fall of 1886, because my recollection is that it was soon after the removal.

7 Q. Will you please state what part you took from that time in the conduct or management of the case, as far as you can do so, without disclosing any matters of privilege?

A. Well, it would be exceedingly difficult to do that. I have counseled and advised from time to time and kept myself pretty well posted, or reasonably well posted, as to the progress of the suit.

8 Q. Were you ever counsel or attorney for Mrs. Bowman, the former wife of the complainant, Frank J. Bowman?

A. I was and am still.

9 Q. From what time have you been counsel for her?

A. I am not now able to fix that date.

10 Q. Was it prior to the institution of this suit?

A. I think so.

11 Q. Did you represent Mrs. Bowman in the matter of the divorce suit between herself and the complainant?

A. I did.

12 Q. And in the matter of contest about the settlement of her alimony subsequent to the decree?

A. No; the alimony was settled previous to the decree, but in that matter I represented her in conjunction with Mr. Henry B. Davis.

13 Q. You spoke of your having to take some action in this matter or give some counsel in respect of the search of the
749 premises occupied by Col. Fordyce on Grand avenue; was that the former residence of the complainant, Frank J. Bowman?

A. It was.

14 Q. And was Mrs. Bowman at the time you speak of occupying those premises?

A. She was not.

15 Q. Please state, as far as you feel authorized without infringing upon any matters of privilege, what was done in respect of that search at that place.

A. You mean from the beginning?

COUNSEL: Yes.

A. At my request Mrs. Bowman obtained from Mrs. Fordyce consent to visit the premises after ten o'clock in the forenoon, and after the house was straightened up, for the purpose of making search in the attic of the building, in which a lot of stuff, consisting of pictures and furniture and trunks that Mrs. Bowman had stored in

the attic and nailed up in a room previous to the renting of the house to Col. Fordyce. She obtained this consent and the day was fixed, and by appointment Mrs. Bowman, Judge Henry Sutton, and myself met at the house, or rather in front of it, and had a carpenter meet us there, for the purpose of breaking open this nailed-up partition. In our presence the carpenter broke open this partition in the attic of this building, and we made a partial search of the room. The search was principally confined to a certain trunk, the location of which Mrs. Bowman seemed to know. When that was found it was dragged out into the room in front and opened, and we then made search—that is, Mrs. Bowman, Judge Sutton, and myself—through the papers in that trunk for such letters or papers as might be in the handwriting of William F. Patrick. This trunk had in it nothing, to my recollection, but papers, and we spent, I should judge, three hours in this search.

16 Q. The date of that, as near as you can state, then, was what?

A. It is impossible for me now to remember the date.

750 17 Q. Can you fix the month?

A. I can't even remember the month.

18 Q. Or the reason, whether fall or summer, spring or winter?

A. My impression is that it was in the spring, but I remember more the condition of the large building that was then being built across the street from the residence than I do anything else, for I there met Tom Walsh, the architect of the building, and talked with him about that large college that was then in progress of erection. They at that time had the foundation built to the first story, or nearly built.

19 Q. Did you find in the trunk any papers in the handwriting of William F. Patrick or any other papers for which you searched?

A. We found papers purporting to be signed by him, but I did not at that time know the handwriting of Mr. Patrick.

20 Q. Do you know it now?

A. I can't say that I know it now, except in so far as I could assume that the papers then found were true samples of his handwriting.

21 Q. That is the original in the handwriting or you have been since informed is the handwriting of William F. Patrick. Is that the idea?

A. No, sir; I mean that some of these papers were signed in the name of William F. Patrick, and if they were genuine, then I could form some judgment of the handwriting of Patrick as to the body of some of those documents.

22 Q. But, as a matter of fact, whether or not those documents so purporting to be signed by Patrick were in his handwriting you don't know?

A. I don't know.

23 Q. Can you state how many such papers were there found?

A. I did not count them. I think still that I could identify them if they were produced.

24 Q. Was the number large?

A. No; I can't say the number was large.

751 25 Q. Are there any of those papers which you can remember or identify by a general description of the subject-matter?

A. Well, I am asked to do this suddenly and without thought, and, of course, my recollection is not as complete as it would be if I had time to think it over. I remember there were a number of letters and envelopes. There was one paper in the form of a contract.

26 Q. Purporting to be signed by Patrick?

A. Purporting to be signed by Patrick, is my recollection, and witnessed by a man it seems to me by the name of Roberts.

27 Q. Or Reynolds?

A. Or Reynolds; perhaps that is the name. There was also a letter purporting to be a letter of Patrick written from St. Louis to Bowman, and it seems to me there was a statement of expenditures or an account, and, if I recollect correctly, there was also a notice of protest of a draft, or at least there was some reference to a draft of some $900. I do not now remember how that was, but I could probably if I had the papers.

28 Q. Have you those papers now or any list or memorandum of them which would enable you to state more fully?

A. I have not now.

29 Q. Did you find a letter purporting to enclose the contract of which you have spoken—that is to say, the contract purporting to be signed by William F. Patrick and witnessed by one Reynolds?

A. I did not. I remember to have made a search for such letter, and remember after finding that paper (the contract) that I searched with reference to that fact.

30 Q. And you found no such paper or letter?

A. I found no such letter; no, sir.

31 Q. How were those papers that you did find placed in the trunk? Were they all together or were they scattered pro-

752 miscuously through the contents of the trunk?

A. They had evidently been arranged by a woman, for they were all tied up with threads and in a sort of jumbled, irregular way. These papers were in the main bundled up with a lot of correspondence with reference to other mining matters in Colorado that antedated anything connected with the Sellers transaction.

32 Q. Whom were you representing on that occasion, Mr. Bowman or Mrs. Bowman, or both?

A. Well, I think I was representing both. I was endeavoring to find whatever there was in that trunk that emanated from William F. Patrick.

33 Q. What claim, if any, was Mrs. Bowman making or asserting to the contents of the trunk, or particularly to the papers and letters you were looking for?

A. Well, she claimed to be in possession of everything in the attic, and for awhile she refused to permit any search of that to be made, or anything that might be there to be delivered to Bowman.

34 Q. Did she make that objection through you or to you as Bowman's attorney or counsellor?

A. She made that objection to me.

35 Q. What was done with the papers that were discovered in that trunk—I mean those that related to this suit or the matter of the Col. Sellers and Accident mines?

A. I selected out such as seemed to bear on this case and bundled them up and brought them away with me.

36 Q. What agreement or understanding, if any, had you, as representing Frank J. Bowman or Mrs. Bowman, about the disposition of the papers so brought away?

A. None whatever.

37 Q. What did you do with them after you brought them away?

A. I brought them to my office and put them in my desk. I do not remember whether Bowman was in the city at that time or not.

38 Q. Please state what afterwards was done with them, in detail.

753 A. I do not know as I can tell exactly what was done in detail, but Bowman came and inspected the papers.

39 Q. At your office?

A. At my office. Subsequently Mr. McGinness came and inspected them, but I know they finally left my place and went to Mr. McGinness'.

40 Q. Did you refuse at any time after those papers were found to deliver them to Mr. Bowman.? And, if so, please state for what reason.

A. Well, I at first refused to show them to Bowman, but this refusal was not serious. I remember to have joked him awhile about them.

41 Q. Was it only a joke?

A. It was only a joke. I told him that I had found nothing and worried him awhile.

42 Q. What difficulty was there, Judge, at any time after you came into the possession of those papers at the place on Grand avenue to prevent their production as evidence or exhibits in this case by you as counsel for Bowman?

A. Well, that will require some explanation. Mrs. Bowman was exceedingly hostile to Bowman, and when I first visited her house and asked her to permit me to search this trunk she refused in the most flat-footed and peremptory manner. She subsequently met me and asked me if I represented Frank Bowman. I told her that I did. She then asked me or said to me in any matter that might arise in which his interest might conflict with hers would I take her part or his, to which I answered that I would under all circumstances take her part. With that assurance she said that I might investigate the trunk and she would assist me and I might do as I pleased, but she would rely on me to protect her interest. At this time the property that Bowman had conveyed to her was encumbered with some deeds of trust, one held or represented, I think, by Mr. Weil, and the other either held or represented by Mr. Chapman.

754 There were interest notes past due. She had no money to pay this interest, and I thought this was a good way to make Bowman put up this interest, and I used those papers to some extent to bring about this result.

43 Q. That is, to force Bowman to discharge the payments that were then due on the liens of these deeds of trust before he should have the use of those papers?

A. Not exactly that either; that requires a further explanation. The alimony matter had been settled by Mr. Davis and Judge Sutton, and they had for some reason neglected to take any obligation on the part of Bowman to protect this property against these encumbrances, but there was a verbal understanding, as I understood it, by which he was to do this, so that Bowman at this time was only morally bound to pay off these encumbrances, though not legally, as I understood it.

44 Q. Did you say to him, Judge, that you would not surrender those papers or permit their use in this case until he had arranged that matter satisfactorily?

A. I do not remember to have put it in that form. I rather think I said to him substantially that I would give him the papers in due time, but that I wanted him to pay off those interest notes.

45 Q. Do you recollect of having any interviews with Bowman at the Southern hotel about the delivery or custody of those papers, or any of them?

A. Yes; I remember to have gone to his room on one occasion, but I can't say that I remember now that I went there for the purpose of discussing this subject.

46 Q. Did any discussion of this subject take place while you were there?

A. I think so, but I do not remember it distinctly; I do not remember any other business that I had with him.

47 Q. Can you state whether at any time after you told Bowman you had the papers relating to this matter or exhibited to
755 him any bundle or batch of papers you still declined to surrender them to him or give him the use of them? the

A. My recollection is that he saw the papers on the same occasion on which he first called, but that he didn't get them for some time after that; I do not remember how long.

48 Q. Will you state again for what reason he did not get them?

A. Well, I thought that I ought to protect Mrs. Bowman as far as I could in her troubles and was endeavoring to do that.

49 Q. That is to say, he didn't get them because you would not allow him to have them?

A. That is the idea. I would not at that time.

50 Q. Subsequently, when either Mr. Bowman or Mr. McGinness got those papers, did he get all the papers in your possession relating to the Col. Sellers and Accident mines?

A. Do you mean, did Bowman get them?

51 Q. Or did Mr. McGinness get them?

A. They did.

52 Q. And all at once?

A. All at once.

53 Q. And have you anything by which to refresh your memory as to which of the two, Mr. McGinness or Mr. Bowman, did actually receive them at your hands?

A. I mean that they got all at that time that I got on the first search. My recollection is that I first gave the paper to Bowman to be shown to Mr. McGinness, and that he returned them either that or the next day, but my recollection further is that I finally either gave them in person to McGinness or sent them up to him, his office being just over mine in the same building.

54 Q. Was the contract of which you have spoken—that is to say, the contract purporting to be signed by Patrick and witnessed by one Reynolds—in the first batch of papers so delivered or sent by you?

A. Yes; that was in the first batch and was found at the first search.

55 Q. About how many papers do you think were con-
756 tained in that first batch?

A. That would be almost impossible for me to say or do anything more than to guess at the number. Some of these papers seemed to have no wrappers at all; others had wrappers; for instance, some letters had envelopes and some had none; the paper in the form of a contract was in an envelope when we found it. Now, to give the number of papers I would have to guess at the number of wrappers as well as the documents. I can do that, of course.

56 Q. Please do so.

A. I should judge there were five or six letters and documents and probably as many as ten other papers, and by other papers I mean envelopes and fractional parts of telegrams. I do not remember any full telegram, but I remember finding two or three parts of telegrams.

57 Q. Purporting to be signed by Patrick?

A. My recollection is now that all these papers bore upon the Sellers case and all of them perhaps purported to be signed by Patrick.

58 Q. Now, at that time had Mr. Bowman complied with your demand or request to adjust this matter of liens upon the Grand-avenue property?

A. You mean at the time of the search?

59 Q. At the time of the delivery of the first batch that you have spoken of.

A. He had not at the time Bowman first inspected them, and I can't tell the order in which those events occurred. I can only say that when the papers finally left my possession for McGinness that the matter had been arranged.

60 Q. How arranged, Judge?

A. Bowman had agreed to pay those interest notes and to fully protect Mrs. Bowman against the encumbrances on the Grand Ave. property.

61 Q. Was the performance of that promise or contract secured in any way?

A. It was not.

62 Q. Was it in writing?

A. It was not. Up to that time he had disputed any responsibility on his part to do this.

757 62½ Q. And the adjustment arrived at was simply his verbal promise to pay the notes you refer to and to protect Mrs. Bowman against the encumbrances you have spoken of upon that property?

A. It was.

63 Q. Has that ever been done in any other way than by his verbal promise?

A. It has not.

64 Q. Has either of the notes you refer to as being past due at the time you spoke of been paid?

A. The interest notes were paid, and Mrs. Bowman subsequently sold the Grand-avenue property to the Marquette club, and of course had to pay all those encumbrances, and I am now endeavoring to secure from Bowman at least his obligation to refund those moneys.

65 Q. And that you have not yet secured?

A. I have not.

66 Q. And Bowman has paid no part of the encumbrances himself?

A. He has not, though Sutton, as trustee for Mrs. Bowman, holds, as I understand, some collateral, the value of which I do not know.

67 Q. Is that the collateral which was given at the time of these negotiations with you, or subsequent to that, or something that Sutton held prior?

A. These collaterals were given at the time that he and Mr. Davis closed up the alimony matter, and Davis acknowledged satisfaction of the decree.

68 Q. That is, then, prior to the institution of this suit of Bowman against Patrick?

A. It is prior to the time when we made this search; I do not know otherwise.

69 Q. Now, Judge, how about the next search after the one you have detailed?

A. I made the second search at the request of Mr. McGinness.

70 Q. And about how long after the delivery of the first batch of papers?

A. My impression is now that I made this second search
758 the latter part of the summer of 1887. I know that was made at the southwest corner of Garrison and Locust, where Mrs. Bowman was then living, and I think it was perhaps in August or September; maybe a little later.

71 Q. I understand you to say that you had delivered to McGinness or Bowman all of the papers which you found in the trunk that related or purported to relate to the Col. Sellers or Accident mines or either of them. Is that a correct understanding of your testimony?

A. All that I found at the first search.

72 Q. Now, this paper in which you found this contract, do you recollect what directions it had upon it?

A. My recollection is, though it is not at all distinct, that it was "F. J. Bowman, St. Louis, Missouri."

73 Q. Do you remember anything as to the handwriting of that superscription or address?

A. Only that it seemed to be in the same handwriting as the Patrick signature.

74 Q. Is there anything to lead you to the inference or recollection that the place or address was St. Louis further than the idea that that is the residence or was the residence of Frank J. Bowman?

A. I can't remember that very distinctly, Mr. Cunningham, but my recollection, as far as it goes, which is exceedingly indistinct, is that the envelope was a large buff envelope; that that was the address on it, and that the postmark was Leadville, but my recollection on all these matters is so indistinct that I don't put much reliance in them.

75 Q. Do you recollect whether that letter bore any printed card or letter-head?

A. I don't remember that.

76 Q. When you had sent to McGinness or delivered to Bowman this batch of papers was that contract in the envelope?

A. It was.

77 Q. How was the batch of papers tied up or secured together at the time they were so delivered?

759 A. They were tied with a string.

78 Q. Did you take any receipt or memorandum from Mr. McGinness or Mr. Bowman for those documents?

A. I did not.

79 Q. No acknowledgment of their receipt?

A. No, sir.

80 Q. Did you have any conversation with Mr. McGinness afterwards indicating whether he had received that package or from Bowman indicating that he had received the package?

A. I knew at the time that McGinness got all the papers that I found at this search and I saw them in his possession in his office.

81 Q. Now, the subsequent search that you made in the latter part of the summer; please state what that was and its result.

A. Well, Mr. McGinness requested me to get possession of the trunk and search it thoroughly from one end to the other and see if anything further could be found in it, and if nothing was found—as I remember, that search was to be so thorough that I would know that there was nothing else in it bearing upon this matter, and after making the appointment with Mrs. Bowman for a certain day we went there and we spent the major part of the day, and she and I together went through every paper in that trunk, going back, some of them, to near the war in date; away back.

82 Q. Did you find anything relating or purporting to relate to the Col. Sellers and Accident mines or either of them?

A. I remember to have found some scraps of papers with handwriting on it similar to Patrick's, but nothing that seemed to bear upon the Sellers case, that I remember.

83 Q. Was there any other search ever made or any other papers ever discovered by you relating to this matter in controversy in this suit except those papers which you delivered to Mr. McGinness or to Mr. Bowman in the first batch that you have stated?

A. Subsequent to this second search Mr. McGinness requested

permission to make search himself and see the contents of
760 that trunk, and I procured from Mrs. Bowman her consent, and he was allowed to do this, but with what results I do not know.

84 Q. Was that the same trunk that you at first examined at the Grand-avenue place?

A. The same trunk; yes, sir.

85 Q. And were all the papers which were in it at Grand avenue brought away in it?

A. Well, the papers that I found, or that we found, rather, she and Judge Sutton and myself, which seemed to bear upon this Sellers matter were brought away be me. I then directed the partition to be nailed up and the trunk to be carried by an expressman, in company with this carpenter, from that building over to a house on Lucas avenue, just west of Garrison, where Mrs. Bowman lived, so that they might be more easily accessible thereafter.

86 Q. That is Lucas Ave. and not Locust street?

A. No; at that time Mrs. Bowman lived on Lucas avenue, about a block and a half west of where I lived. See was then boarding, and the trunk was taken to this house, which, I believe, was kept by a lady by the name of Carr. Subsequent to this Mrs. Bowman went to housekeeping herself on the southwest corner of Garrison and Locust, and then the same trunk was taken there.

87 Q. Do you remember anything further than what you have already stated of the contents or nature of any of those papers or letters delivered by you to McGinness or Bowman?

A. I think if the papers were shown me I could identify without much trouble the papers that I found then, but I can't identify them now without actually seeing them again, or at least not with that degree of certainty which I would be willing to risk.

Mr. CUNNINGHAM: The defendant asks counsel for the complainant if he will produce the batch of papers so delivered to him by the witness for the purpose indicated in the last answer of the witness.

761 Mr. MCGINNESS: Every paper in the case that I have relating to this matter has been offered in evidence, and they are all exhibits in this case. I have them here in their order, and they are marked exhibits from 1 to 28, inclusive.

Mr. CUNNINGHAM: I will ask if you mean they are all the papers that were delivered by Judge Laughlin to you or to Mr. Bowman.

Mr. MCGINNISS: The exact number and which ones I do not now remember. I was getting my exhibits from two sources—from those that Mr. Bowman brought me and from those that came through Mr. Sim. Price from the McManus family—and when I put them in evidence, as attorney for the complainant, I put them in the order in which I thought they came, and just when I got the particular batch or how many were in that batch I do not know, but they are all comprised in that list of from 1 to 28 exhibits, except the ones that I put in evidence in Leadville recently on the cross-examination, some of which I got from Mr. Bowman a long time after his

deposition was taken, and one of which I discovered myself in the trunk when I went to Mrs. Bowman's. I think it was in September, 1887. That is one of the letters dated June, 1882, either number 27 or 29.

(Exhibits referred to were handed to counsel for the defendant-.)

88 Q. Please look at this batch of papers, numbered from one to 28, inclusive and consecutively, being plaintiff's exhibits from one to 28 already put in evidence, and see if you there find the buff envelope about which you have testified.

A. I find no buff envelope in this batch.

89 Q. Do you find any such envelope as you have spoken of as being the envelope containing the contract you referred to, being the paper marked 28 and here shown you?

762 A. I find no such envelope in this batch.

90 Q. Will you please look in that batch and see if you find any such paper as you have referred to as being the notice of protest?

A. I do not.

91 Q. Will you please look at this paper marked 28, and state whether that is the paper of which you spoke as purporting to be a contract signed by William F. Patrick and witnessed by one Reynolds?

A. That is the same paper that I found in the trunk when I made the first search.

92 Q. And that was among the papers delivered by you in the first batch that you spoke of?

A. Yes, sir.

93 Q. And I also understood you to say that you never at any time after that yourself delivered any papers relating to this matter to Mr. McGinness or to Mr. Bowman, nor did you ever after that first batch was delivered find any papers relating to the Col. Sellers or Accident mines; is that true?

A. Well, that is nearly true.

94 Q. How near?

A. I found some papers on the second search that I delivered to Mr. McGinness, but I don't think they had much bearing upon this case, and I believe he agreed with me.

Mr. McGINNESS: They were papers relating to old St. Louis matters.

95 Q. I will ask you whether you have any interest, and I wish in this question to disclaim any sort of supposed imputation or reflection upon your desire to state truthfully and fairly—with that explanation which I wish to make for myself here, I will ask what, if any, interest you have in the result of this suit or in the suit itself.

A. That is a pretty hard question to answer. I have the interest of a lawyer who has a fee at stake; I have the interest of seeing Bowman succeed; I have the further interest of seeing Mrs.

763 Bowman protected in what she ought to have; I hardly know

how further to describe it, except I have an active and aggressive interest to have Bowman succeed in the case.

96 Q. Is your compensation as attorney or counsellor or solicitor in the case dependent in any way upon the result of this suit, and, if so, in what wise and to what extent?

A. Well, I hardly know how to answer that. Bowman has agreed to pay me a fee, but whether I will be able to get it or not unless he succeeds is a question. My compensation is not contingent.

Cross-examination waived.
Signature waived.

By consent of parties the further taking of testimony in this cause was adjourned until two o'clock, Wednesday, December 21st, 1887.

DECEMBER 21, 1887.

Parties met pursuant to adjournment.
Present: As at the last hearing.

Plaintiff offers to cross-examine Judge Henry D. Laughlin in regard to certain papers. Defendants object, and the witness is thereupon recalled in rebuttal.

HENRY D. LAUGHLIN, being sworn and examined in rebuttal, testified as follows:

(By Mr. MCGINNESS:)

1 Q. Since you were examined day before yesterday, no other witness having been examined in the meantime, I will ask you if you have since seen the papers that you got out of that trunk that was in Mrs. Bowman's possession.

A. I have.

764 2 Q. You stated in that examination that you saw something like an account; you were not certain about it, but it seemed to you that you saw something like an account that you found among those papers. I now hand you a paper and ask you whether or not that is the paper that you found in that trunk which you referred to as an account. (Paper shown witness.)

A. This is the paper to which I referred, and I identify it by some writing on the back of it, which I believe to be Bowman's handwriting.

3 Q. Whose handwriting, if you know, is on the face or body of that paper?

A. I don't know except by comparing the body of the writing with the signature of the two Patricks.

4 Q. In whose handwriting is it from that comparison?

Counsel for the defendant objects, the witness not being qualified to state.

A. That is the paper to which I referred at the time when I spoke of the account.

5 Q. Is that or not, according to your best judgment, the same handwriting as the other papers you found since identified as the handwriting of William F. Patrick?

Defendants' counsel objected on the ground that the witness is not qualified to testify to the handwriting of parties, and other documents or papers are not presented to the witness for comparison, and on the ground that he is not an expert in handwriting.

A. I think that is the same as some of these papers.

Mr. McGINNESS: I now offer that paper in evidence.

Paper referred to is marked Exhibit A in connection with Judge Laughlin's examination in rebuttal.

Defendants' counsel objects on the ground that it is irrelevant and immaterial and has no reference to this case and not proven.

765 The paper is as follows:

The different parties' interest in the "St. Louis" mining claim lying in California mining district, in Lake county, Colorado, adjoining the "Fanny Rawlings" claim, is as follows:

M. Flinn (supposed) ..... One-eighth.
August Zaber (supposed) ..... One-eighth.
Wm. F. Patrick ..... One-fourth.
Henry J. Chase, trustee ..... Three-eighths.

The interest of James M. Patrick is to be non-assessible for work done in sinking shaft to mineral and for all expenses and cost in carrying on all necessary litigation, including the obtaining a patent. The interest of Wm. F. Patrick is to be non-assessible for all expenses and cost of all litigation and obtaining a patent for said claim.

And the interest of said Chase, trustee, is to bear all of said expenses, except that the interest of Wm. F. Patrick is to bear its share of expenses for sinking shaft to paying mineral.

And the said Chase, trustee, hereby agrees to convey, as soon as conveyances are made to him from M. Flinn and August Zabel, sufficient of his interest as appears on record to make the interest of Wm. F. Patrick one-fourth, as above set forth.

HENRY J. CHASE, *Trustee.*
W. F. PATRICK.
JAS. M. PATRICK,
By W. F. PATRICK,
His Att'y-in-Fact.

6 Q. You also stated in your direct examination or in your examination by the defendants that you thought you saw a paper relating to a protested or an unpaid draft. I now show you a paper or letter dated Leadville, May 21, 1882, in which the following language occurs: "In regard to my draft on you I told you that
766 I had no idea Wilson would pay and that I would draw on you," etc., being Plaintiff's Exhibit 18 in this case, in connec-

tion with Mr. Boeman's deposition, and I will ask you if that is the paper or letter to which you referred in your direct examination or your former examination by the defendant in this case in relation to that draft.

A. I hardly know how to answer that question; my recollection now is that the notice of protest that I saw referred to a protest or draft on the Boatman's savings bank or the protest of the note held by the Boatman's savings bank in the city of St. Louis for some $900, but since thinking the matter over and since I testified before I am quite confident that the notice of protest antedated—I am entirely confident that the notice of protest I then saw was not only with reference to a paper drawn on the Boatman's savings bank or held by the Boatman's savings bank, but also that it antedated some time the transaction between Bowman and the Patricks in 1882. I remember having seen the exhibit presented to me, and it is one of the papers to which I referred in a general way in speaking of the papers which I got from Mrs. Bowman's trunk.

7 Q. Relating to an unpaid draft?

A. Well, when I spoke of the notice of protest I had no special reference to this letter, but I remember this letter and the reference to the unpaid draft in it.

8 Q. Now, I will ask you whether or not before you made the second search in the summer of 1887 I had not urged you to look for a letter, if there was any, accompanying the contract that Bowman received on the 28th of August, as he testifies, and did not sign, but signed one somewhat like it; and if you did not find it that I requested you to search for am envelope which would be necessarily directed to Bowman somewhere in Wisconsin, and see if you
767 could find such envelope directed to him with any postmark, and if you did not make search and fail to find any at any time.

A. I have never read Bowman's testimony, and do not know what he testified on this subject, but I remember now distinctly that when we found the paper purporting to be a contract signed by Patrick and witnessed by Reynolds, and not signed by Bowman, that my attention was at once directed to the omission of the date, and that I endeavored to find something or other that would in some way fix the date of that paper, and that I found nothing, and that almost immediately after the papers were turned over to you you made a request that I make an additional search to see if I could find either a letter or an envelope, such as a paper of this character would be enclosed in, so that by the postmark on it the date might be fixed, and that that was the special purpose of the second search of the trunk. At neither search did I find such paper.

9 Q. I now show you two letters, one dated Leadville, June 3, 1882, and the other dated Leadville, June 27, 1882, eached addressed to F. J. Bowman and purporting to have been written by William F. Patrick, and will ask you if those are not the two letters that were found by you on your second search, and that we thought when you brought them down, while they related to the case, I did not think

they had any particular bearing on it, as we already had other letters in evidence on the same subject.

A. Those are the two letters which I discovered in the second search, and which I turned over to you along in the summer of this year, and which you at the time thought were of little value for the reason stated.

10 Q. In your direct examination or former examination you mentioned some telegrams that you turned over which you discovered. I now show you two telegrams, one a copy of the other, each dated July 15, 1882, each signed "William F. Patrick" and addressed "Frank J. Bowman," one to him at St. Louis, Mis-
768 souri, and the other to him at Ashland, Wisconsin, being already offered in evidence in the case with Bowman's deposition, and I will ask you if they are not the telegrams to which you referred as relating to the case.

A. These are two of the telegrams that I referred to.

11 Q. You also referred to some other telegrams that you found, that were of a ragged nature, which you thought had no bearing on the case or did not refer to the case. I now show you four telegrams, some signed by William F. Patrick alone and other- signed by him and Wilson together, and each addressed to Bowman, and all along in February, 1882, and will ask you if those are the other telegrams.

A. Those are the other four telegrams, and they comprise all of the telegrams, so far as I can remember them, with the exception of one-half of a telegram that I discovered on the first search, but thought of no value and left in the trunk; discovered it again on the second search, and my recollection now is that I brought that down to you. It contained on the right-hand side of the telegraphic message the date and the name "Patrick," but there was not enough of it to be able to determine what it referred to. The date, however, was prior to 1882, and, I think, was in 1881—March or April, 1881.

Defendants' counsel objects to so much of the answer of the witness as states the contents of the torn telegram as incompetent and irrelevant and not the best evidence.

Counsel for the defendant- examines the telegrams and then says: In respect to the four telegrams last referred to in the question to the witness and his answer the counsel waives any offer of those in evidence, as they do not relate to this case.

12 Q. I now show you from William F. Patrick's deposition in this case, taken in November, 1887, at Leadville, what he
769 testified was a copy of a letter that he wrote to Mr. Bowman, dated "Leadville, July 5, 1882," and written to Frank J. Bowman, addressed "St. Paul, Minnesota," by William F. Patrick, and ask you to read that and say whether you found any such letter as that in the trunk.

A. I did not find such letter.

13 Q. I will ask you in the same connection to look at the statement or rather the copy of the statement referred to in the copy of

a letter dated July 5, 1882, which statement is set out in full in William F. Patrick's deposition, and will ask you to read that statement and say whether or not you found any such statement as that in the trunk.

A. I did not.

Cross-examination by Mr. ELIOT, of counsel for the defendant-:

14 X Q. Mr. Laughlin, you referred in your examination by the defendants to a certain notice of protest which you then said you found or it was your impression you found among the papers in the trunk at the plaintiff's former residence. Can you state positively what the character of that paper was?

A. I can state positively that the Boatman's savings bank figured in the portest, and I am quite confident that the papers is yet in that same trunk. I identify it in that way, and it was either a draft drawn on the Boatman's savings bank or through the Boatman's savings bank, or it was a note protested at the request of the Boatman's savings bank.

15 X Q. What is you- best recollection of the amount indicated in that paper as being either the declaration of a protested draft or note or indication of it in some way?

A. My recollection as to the amount is not clear, but as far as it goes it was for $900.

770 16 X Q. Are you able to state with any certainty the date of that paper or draft?

A. I am not, but think I can find the paper in this same trunk.

17 X Q. Will you do so?

A. I will, with Mrs. Bowman's consent, and I have no doubt of being able to obtain it.

Signature waived.

JOHN W. DRYDEN, being sworn and examined on behalf of the defendant-, testified as follows:

(By Mr. CUNNINGHAM:)

1 Q. State your name, age, residence, and occupation.

A. My name is John W. Dryden; my age is 44; I reside in St. Louis, Missouri, and am an attorney-at-law by profession.

2 Q. How long have you been such?

A. Since 1867.

3 Q. Where have you practiced your profession?

A. In the city of St. Louis chiefly.

4 Q. For how long a time have you practiced as attorney in this city?

A. I have had more or less practice since 1867; mostly since 1868-'9; the fall of 1868.

5 Q. Do you know Frank J. Bowman, the plaintiff in this case?

A. Yes, sir.

6 Q. How long have you known him?

A. You mean how long have I had personal acquaintance with him or how long by sight; either or both?

7 Q. Either or both?

A. I can't recollect exactly when I first became acquainted with Mr. Bowman or when I first knew him by sight. I think I must have known him by sight almost as long, if not fully as long, as I have practiced law in the city of St. Louis. I think I can safely say I have had personal acquaintance with him since 1873–'4, probably.

771 8 Q. What has been Mr. Bowman's business or profession, to your knowledge?

A. That of an attorney-at-law during all that time.

9 Q. In this city?

A. Yes, sir.

10 Q. Has he or has he not taken a place of prominence or notoriety in this city during that time?

A. He has.

11 Q. Are you acquainted with the general reputation of Frank J. Bowman for truth and veracity in this community in which he has lived?

Objected to by the plaintiff's counsel unless the witness will state that Mr. Bowman at the time he gave his testimony in this case was a resident of this community.

A. I think I am; yes, sir.

12 Q. What is that general reputation?

A. His reputation is bad for truth and veracity.

13 Q. From what you know of his general reputation for truth and veracity, would you believe him under oath?

A. I would not in any matter where he was interested to swear falsely.

14 Q. Are you acquainted with the general reputation of Frank J. Bowman for morality and correctness of conduct and life in this community?

A. Well, aside from the question of his character or reputation for speaking the truth or not, I cannot say that I have very much knowledge of his reputation. I have heard a good many things about him, but I don't know that I ever hears his reputation or his character discussed distinctly as to anything except with reference to whether he told the truth or not, and as to whether he acted properly as an attorney relative to his clients and things of that kind. I have heard that talked of, and I can say I know his reputation as to that.

15 Q. What is that reputation?

772 Objected to as going into new particulars, the examination having ended when the witness says his reputation is bad. The question is as to Bowman's general reputation, and not his conduct in regard to specific acts.

The WITNESS: That reputation is bad also—that is, that he has a reputation of not being trustworthy or faithful to his clients.

Cross-examination by Mr. McGINNESS, for the plaintiff:

16 X Q. Do you not know that Mr. Bowman is not now a resident of this community, but for nearly a year, at least six months or more, has been a resident of the State of New York?

A. No, sir; I don't know that.

17 X Q. If Mr. Bowman is the man that you say his general reputation indicates, what is your opinion of a man who would go into partnership with him and then defraud him?

Objected to as incompetent and irrelevant, no proper foundation having been laid for the opinion of the witness on such subject.

The WITNESS: Do you mean by your question my opinion as to the character of the man or the advisability of his going into partnership with him?

18 X Q. No; the character of the man who would do that.

A. Well, I don't think I could give a very intelligent opinion as to the character of the man. I should say it would be very imprudent for a man to go into partnership with such a man if he knew his reputation was as I have already stated.

Defendants' counsel moves that this question and answer be stricken out.

19 X Q. Suppose he also defrauded that man after committing the folly of going into partnership with him, what would you
773 then say?

Defendants' counsel objects to this question as incompetent and frivolous.

A. I think it would be unfortunate for him to go into partnership with him, and he perhaps might blame himself to some extent for his misfortune.

20 X Q. What is your opinion of a man who had gone into partnership with such a man and had then defrauded him?

Counsel for the defendant objects to the question as heretofore and moves that it be stricken out.

A. Oh, that man defrauded him?

COUNSEL: Yes.

A. I don't understand what you want.

21 X Q. In your opinion would he be a worse man than Mr. Bowman with the reputation you have given him?

Counsel for the defendant objects to the question as heretofore and moves that it be stricken out.

A. I should think that if he defrauded Bowman he did a very wrongful act. Whether he defrauded Bowman or not might depend on a great many other things besides that.

Signature waived.

ELIOT C. JEWETT, sworn and examined on behalf of the defendant, testified as follows:

(By Mr. ELIOT:)

1 Q. State your name, age, residence, and occupation.

A. My name is Eliot C. Jewett; I am 37 years old; I reside — 3007 Locust street, and am a mining engineer by profession; I am now in charge of the United States assay office, and have been for nearly seven years, in this city.

2 Q. How long have you resided in this city?

774 A. With the exception of an absence of two or three years on two occasions, since 1857.

3 Q. Are you acquainted with William F. Patrick, one of the defendants in this case?

A. I am.

4 Q. Did you see Mr. Patrick at any time in the fall of 1882? And, if so, state when and where.

A. I did. I saw him—the special occasion which I can swear to and remember is on the occasion of my wedding, which took place at my present residence, my father-in-law's house, 3007 Locust street, on the 19th of October, 1882. Mr. Patrick was present at the wedding with his wife.

5 Q. I presume the house you refer to, 3007 Locust street, is in this city?

A. It is.

6 Q. Do you know Frank J. Bowman, the plaintiff in this case?

A. I do not personally. I know him by sight, but not personally.

7 Q. Do you know what his business has been or is?

A. He has been a lawyer, to the best of my knowledge and belief.

8 Q. Have you any knowledge of where he has resided and for how long, as a matter of personal knowledge or public notoriety?

A. As a matter of public notoriety I have known his residence to be St. Louis, and his house I have known, as having had it pointed out to me a number of times in this city.

9 Q. Are you acquainted with the general reputation of Mr. Bowman for truth and veracity in this community?

A. I think I am, with his general reputation.

10 Q. What is that?

A. Bad.

11 Q. From what you know of his general reputation would you believe him under oath in any matter in which he is interested?

A. No; I would not, basing that on his general reputation, not on a personal knowledge of any circumstances.

775 Cross-examination waived by the plaintiff.
Signature waived.

At this point the further taking of testimony in this cause was adjourned until a p. m. to-morrow, December 22nd, 1887.

DECEMBER 22, 1887—2 p. m.

Parties met pursuant to adjournment.
Present: As at the last hearing.

JOHN G. CHANDLER, sworn and examined on behalf of the defendant, testified as follows:

(By Mr. ELIOT:)

1 Q. State your name, age, residence, and occupation.
A. My name is John G. Chandler; I reside in St. Louis county, Missouri; am 50 yesrs of age; am a lawyer by profession.
2 Q. How long have you been so?
A. Pretty near 27 years.
3 Q. Are you practicing in this city?
A. Yes, sir.
4 Q. How long have you practiced your profession in this city?
A. A little over 19 years.
5 Q. Are you acquainted with Frank J. Bowman, the plaintiff in this case, either personally or by reputation?
A. I am acquainted with him in both respects.
6 Q. What has been his business or occupation in this city?
A. As far as I know, he was a lawyer.
7 Q. Do you know the general reputation of Frank J. Bowman for truth and veracity in this community?
A. I think I do.
8 Q. What is it?
A. Not good.
9 Q. From what you know of Mr. Bowman with respect to his general reputation, in a matter in which he is interested would you believe him upon oath?
A. I would not.
776 10 Q. Are you acquainted with the general reputution of Mr. Bowman in respect of personal character, honesty, and morality?
A. I think I am.
11 Q. State what that is.
A. It is bad.

Cross-examination waived.
Signature waived.

At this point, by consent, the further taking of testimony in this cause was adjourned until 2 o'clock to-morrow, December 23, 1887.

DECEMBER 23, 1887—2 p. m.

Parties met pursuant to adjournment.
Present: As at the last hearing.

E. T. FARISH, sworn and examined, testified as follows:

(By Mr. CUNNINGHAM:)

1 Q. State your name, age, residence, and occupation.
A. Edward T. Farish, attorney-at-law; residence, St. Louis.

2 Q. How long have you resided in St. Louis.

A. I have been here since I was quite a boy; educated here—since 1845 or '6.

3 Q. How long have you practiced law in St. Louis?

A. Since 1855.

4 Q. Do you know the complainant, Frank J. Bowman?

A. Yes, sir.

5 Q. How long have you known him, about?

A. 13 or 14 years.

6 Q. What has been his avocation during that time, so far as you know?

A. He has been an attorney-at-law here.

7 Q. At the St. Louis bar?

A. Yes, sir.

8 Q. Can you state whether his reputation has been at all
777 general or notorious?

A. Yes; his conduct has been such as to give him great notoriety.

9 Q. Do you know the general reputation in the city of St. Louis of the complainant Bowman?

A. I think I do.

10 Q. Will you state what that reputation is?

A. In a general way, it is not good, if that is what you want.

11 Q. Will you state what his general reputation in this community for truth and veracity is?

A. I don't think it is good.

12 Q. Would you believe him under oath in any matter in which he was testifying in a case in which he was personally interested?

A. No; I think not; I would receive it with a great deal of caution and a great deal of salt.

Cross-examination waived.

Signature waived.

HENRY C. SCOTT, being sworn and examined, testified as follows:

(By Mr. ELIOT:)

1 Q. State your name, age, residence, and occupation.

A. My name is Henry C. Scott; I am 28 years old; I live at 3024 Chestnut street; I am engaged in the manufacture of gas and electric light.

2 Q. How long have you lived in this city?

A. Nearly seven years.

3 Q. Do you know personally or by reputation Frank J. Bowman, the plaintiff in this case?

A. I don't know him personally; I have heard him spoken of frequently.

4 Q. Are you acquainted with his general reputation for truth and veracity in this community?

A. I have heard many expressions as to his reputation for truth and veracity.

5 Q. Are you acquainted with his general reputation in
778 that regard?

A. I think that I am.

6 Q. What is that?

A. His reputation is not good.

7 Q. Are you acquainted with the general reputation of Mr. Bowman for morality, honesty, and correctness of character?

A. I have heard his correctness of character assailed frequently.

8 Q. Are you able to state what his general reputation is in that respect?

A. I think his general reputation is not good.

Cross-examination waived.

Signature waived.

At this point, by consent, the further taking of testimony in this cause was adjourned until Tuesday, December 27, at 2 p. m.

DECEMBER 27, 1887—2 p. m.

Parties met pursuant to adjournment, and the hearing was resumed.

Present: As at the last hearing.

R. W. CRITTENDEN, sworn and examined, testified as follows:

(By Mr. CUNNINGHAM:)

1 Q. State your name, age, residence, and occupation.

A. My name is R. W. Crittenden; I am sixty years old; I reside at 2813 Lucas Ave., St. Louis; am a general agent, but not engaged in any particular, special business.

2 Q. How long have you lived in St. Louis?

A. I have lived here since 1839; I came here in 1839.

3 Q. Do you know the complainant in this suit, Frank J. Bowman?

A. I know him; yes, sir.

4 Q. How long have you known him?

A. Possibly ten years.

5 Q. Do you know his general reputation for truth and veracity in this community?

A. Well, I hardly know how to answer that. I have never had any dealings with the man at all.

779 6 Q. That is not the question. It is his general reputation in the community among people that you have heard speak of him here in St. Louis.

A. Well, it is none of the best, but what I have heard against him is probably all from hearsay.

7 Q. You speak from the general reputation of the man in the community, and not from anything you of your own personal knowledge know of him?

A. Yes, sir.

8 Q. And do you say his reputation in the community for truth and veracity is good or bad?

A. Well, I never heard anybody say that he would lie or anything of that kind—whether he would perjure himself or anything that way, but his reputation as a general thing is bad.

Cross-examination waived.
Signature waived.

Complainant's attorney announced that Judge Laughlin and Mr. Kern found in a trunk at Bowman's residence, in a search on the 26th or 27th of December, a letter written by William F. Patrick to F. J. Bowman, dated Leadville, August 2nd, 1882, which is in answer to a letter of the 16th ulto. written by Bowman to Patrick, and plaintiff's counsel tenders said letter to counsel for the defendant, to be put by them in evidence if they so desire.

At this point the further hearing of the case was adjourned until to-morrow at 2 p. m., December 28th, 1887.

DECEMBER 28, 1887.

Parties met pursuant to adjournment.
Present: As at the last meeting.

EDWARDS WHITTAKER, sworn and examined, testified as follows:

(By Mr. ELIOT:)

780 1 Q. State your name, age, residence, and occupation.

A. My name is Edward Whittaker. I am 39 years old. I reside in St. Louis; am a banker and broker.

2 Q. How long have you been such?

A. 15 years.

3 Q. How long have you lived in this city?

A. All my life.

4 Q. Do you know Frank J. Bowman, the plaintiff in this case?

A. Yes, sir.

5 Q. How long has he lived here, if you know?

A. I have known Mr. Bowman, I suppose, 10 or 15 years.

6 Q. Do you know what his profession or business has been?

A. Attorney-at-law.

7 Q. Are you acquainted with the general reputation of Mr. Bowman in this community for truth and veracity?

A. I have heard Mr. Bowman very severely denounced by a number of people.

8 Q. Do you think that you could state that is his general reputation?

A. I think there are a very large number of people here who think his general reputation is very bad.

9 Q. Do you say, in answer to my question, that his reputation is bad in this respect?

A. Yes; more so than ordinary men in this country.

10 Q. Are you acquainted with the general reputation of Mr. Bowman in this community for honesty, integrity, and morality—that is, his general character?

A. Yes; in a general way.

11 Q. What is that?
A. I don't think it is very good.

Cross-examination waived.
Signature waived.

Defendants offer in evidence a letter of W. F. Patrick, defendant, dated "Leadville, Colo., August 2, 1882," and addressed "Mr. F. J. Bowman."
(The letter was read as follows:)

781 Office of E. A. Reynolds, attorney-at-law, over Bank of Leadville.

P. O. box 416.

LEADVILLE, COLO., *August* 2, 1882.

Mr. F. J. Bowman.

DEAR SIR: Yours of the 16th ult. received. In accordance with your request therein, I send the within paper for signature.

I sold the note in St. Louis before getting your reply; so will have to wait until it matures, which will be September 19. The second sale under Paige and Blow's judgment was made to-day, and only two pieces of machinery were sold. The U. S. marshal has taken possession of the Colo. Prince for the St. Louis under their judgment. There are still two attachments on the Colo. Prince unsatisfied, and we may be able to get title on those, in case we cannot effect the consolidation, which at present looks doubtful.

Yours truly, W. F. PATRICK."

It is admitted by plaintiff's counsel that this writing is in the handwriting of W. F. Patrick and is the same document of which complainant's counsel made tender on March —.

Defendants' counsel here calls for the production by the plaintiff or his counsel of the envelope mentioned by the witness, Henry D. Laughlin, on his first examination in behalf of the defendants, such envelope being postmarked "Leadville, Colorado," and addressed to "F. J. Bowman" and being the envelope which the witness testified he found, together with the contract or draft of contract, in the trunk belonging to the plaintiff at his former residence, and the said envelope being, as defendants contend, the envelope in which were transmitted the contract marked "Plaintiff's Exhibit 28" and the letter now put in evidence.

782 Plaintiff's counsel states that no envelope of that kind has ever been found, and that search has been made for the same, and asks defendants' counsel what he expects to prove by that envelope.

Mr. CUNNINGHAM: We expect to prove that the envelope in question will show a postmark of the Leadville post office, dated the second day of August, 1882, and was addressed to Frank J. Bowman, at Bayfield, Wisconsin, and by the postmark at Bayfield, Wisconsin, we would expect to show upon said envelope that it was received at Bayfield, Wisconsin, in due course of mail.

Mr. McGINNESS: Plaintiff's counsel (not knowing anything about what the facts are) is willing to admit that is was mailed on the second of August, 1882, at Leadville, and did reach Bayfield, Wisconsin, by due course of mail.

At this point the further hearing of the case was adjourned indefinitely.

JANUARY 6TH, 1887.

Parties met pursuant to adjournment.
Present: As at the last hearing.

The taking of testimony in this case was resumed as follows:

A. J. GERHARD, sworn and examined, testified as follows:

(By Mr. ELIOT:)

1 Q. Please state your name.
A. My name is A. J. Gerhardt.
2 Q. You have testified in this case before, have you not?
A. Yes, sir.
3 Q. You have stated, Mr. Gerhardt, that there are some
783 respects in which you wish to correct your testimony given in this case heretofore. Will you please state in what respect you wish to correct the same?
A. I wish to correct the date that I formerly gave in regard to the strike of iron pyrites in the Col. Sellers shaft, which Mr. Whiting reported to me, and I previously stated on the 31st day of July. I wish to change that to the 10th of August, the same year, 1882.
4 Q. Please state, Mr. Gerhardt, how it is that you come to make this correction and upon what information you do so.
A. On the 24th of December last I met a young lady who was in Leadville on a visit of a day or two in the year 1882. She was in Leadville the time I returned from my fishing excursion to Eagle river, mention of which I made in my former testimony. On the 24th day of December I questioned this young lady in regard to the date she had visited, together with her parents (she had visited the city together with her parents), and she told me some time from the 18th to the 20th.
5 Q. Of what month?
A. Of August, 1882. I asked her if she was not mistaken, as my recollection was that the date was the 10th of August, and she said "No;" that she was positive that she was correct in regard to the date.
6 Q. How does that lead you or did that lead you to the conclusion that you were mistaken in your former testimony in placing the 31st of July or the 1st day of August as the time when Mr. Whiting made the statement to you in respect to the discovery of iron pyrites in the Col. Sellers shaft?
A. Well, it led me to think that I might possibly be mistaken and the young lady be right in regard to the date. I then decided that if the old firm books of Gerhardt & Nead were still in existence

I could prove by them the date at which I left and came back to Leadville in August, 1882.

784 7 Q. How long were you on that fishing or hunting expedition that you have referred to?

A. Nine or ten days.

8 Q. Then your statement is that you saw the young lady whom you mentioned in Leadville on the 20th of August, the same day of your return from the fishing expedition. Do I understand you correctly?

A. No; the 19th of August; I left on the 10th and came back on the 19th, which would make it ten days, including the 10th and 19th.

9 Q. Refreshing your recollection from the books of Gerhardt & Nead, what do you find there which makes you certain of the date when you left Leadville and returned?

A. I find, on examining our blotter or day book, that my handwriting ceases with one entry on the 10th day of August and does not commence again until the 19th day of August. Mr. Nead was absent on a trip East before the 10th of August, and his handwriting does not appear between the 26th day of June, 1882, and the 10th of August the same year.

10 Q. What connection had your trip, upon which you say you started on the 10th of August, 1882, with the information given you by Mr. Whiting and which you have referred to in your testimony?

A. Mr. Whiting gave me the information on the morning of the day I left Leadville on this fishing excursion.

11 Q. Of that fact you are certain?

A. Of that fact I am certain.

12 Q. And therefore the error in your former testimony?

A. Yes, sir.

13 Q. Does the discovery of this error in your former testimony in any way affect your former testimony as to the time when you first purchased an interest in the Col. Sellers and Accident claims?

A. Yes, sir; it throws the date of purchase from the middle of July to the end of July, 1882.

785 14 Q. What reason have you for thinking that this event of your leaving Leadville on a fishing expedition would throw, in your memory, the time of purchase in the Col. Sellers from the middle of July until the latter part?

A. Since I gave my testimony I have found a memorandum of agreement with Mr. Whiting in regard to the purchase from T. C. Stebbins of one-sixteenth interest in the Col. Sellers mine. This document is dated the 31st day of July, 1882, which was the date I bought into the mine; my first connection with it. I discovered that document only this morning.

15 Q. Have you that with you?

A. I have it with me.

16 Q. Will you exhibit it to counsel?

A. Yes, sir.

(Document produced and shown to counsel.)

20 Q. Mr. Gerhardt, please examine this paper and state what it is and in whose handwriting it may be, if you know.

A. This agreement was drawn up by Mr. J. C. Whiting, is in his handwriting, and is the one I have referred to in my other testimony.

21 Q. Do you identify this as the handwriting of Mr. Whiting?

A. Yes, sir.

Defendants' counsel offers the paper last referred to in evidence. The same is marked Exhibit B by the examiner, and is as follows:

"LEADVILLE, COLO., *July 31st*, 1882.

Having this day paid T. C. Stebbins, of this city, one hundred dollars by Gerhardt & Nead's check on Bank of Leadville, under a memorandum of agreement in writing delivered to E. L. Salisbury, attorney, this city, as a basis for an escrow agreement as stated therein, this is to certify that Mr. Albert Gerhardt is to be included in such agreement jointly with myself, he bearing equally the payments.

J. C. WHITING."

786 19 Q. Mr. Gerhardt, I now call your attention to your former testimony—to the following question and answer: "Q. When did you first hear and from whom that mineral had been found in the shaft of the Col. Sellers mine? A. I believe from Mr. Whiting. Q. When? A. I think the last day of July." And I will ask you to state wherein, if at all, you wish to correct the answers then made.

A. The first answer is correct. The second answer I wish to change the date from the 31st of July to the 10th day of August.

20 Q. I will call your attention to your former examination and to the following question and answer: "Q. How do you fix that fact in your memory? A. Because on the 1st day of August, after I had purchased and paid for a portion of the interest from Mr. Stebbins, I went with some friends on a camping expedition 40 or 50 miles from Leadville and remained eight or ten days. I started on that expedition either the 1st or 2nd of August." And I will ask you wherein, if it all, you wish to correct that answer.

A. I wish to correct the dates; the first date from August 1st to August 10th and the second dates—that is, the first and second—to the 10th.

21 Q. In your testimony there is also this question and answer: "Q. What was the date of your information (from Whiting); when did you learn that fact? A. I think it was the very last day of July." And I will ask you wherein, if at all, you desire to correct that answer. What was the date of the information from Mr. Whiting?

A. I wish to change that date to the 10th of August.

Cross-examination by Mr. McGINNESS:

22 X Q. You bought into the mine on July 31st, 1882?

A. Yes, sir.

23 X Q. Did not the negotiations commence a day or two
787 before that writing?

A. As far as I was concerned, no.

24 X Q. I mean as far as you were concerned.

A. As far as I was concerned, yes; my arrangements with Mr. Whiting commenced on the 31st day of July.

25 X Q. He made to you, then, certain statements regarding the appearance of the shaft?

A. On that day?

26 X Q. On that day.

A. Oh, he spoke of this matter two or three weeks before that statement.

27 X Q. That brought it on down to the 31st of July?

A. Yes.

28 X Q. So that Mr. Whiting had communications with you in regard to the appearance of the shaft from that time down—that is, from the middle of July to the 31st of July?

A. Yes, sir.

29 X Q. And you yourself knew of the location of the property and surroundings?

A. Yes, sir.

30 X Q. Now, what information did you get from Mr. Whiting about the 31st of July or immediately before as to that shaft? What did he say to you?

Counsel for the defendant objected to the question as incompetent and irrelevant, and on the further ground that anything Mr. Whiting may have said at that time is not binding on the defendants here.

A. Mr. Whiting informed me that the appearance of the shaft was very favorable and encouraging.

31 X Q. You stated in your former examination Mr. Whiting went up there nearly every day to examine that shaft.

A. Yes, sir.

32 X Q. Now, you are positive you left on the 10th of August, 1882, to go on a fishing excursion?

A. Yes, sir.

33 X Q. And this information that Mr. Whiting gave you on the 10th of August, 1882, just prior to your leaving, was about a seam or streak of iron pyrites, was it not?

A. Yes, sir.

788 34 X Q. Something that had been discovered prior to the time he made that statement to you?

A. Exactly.

35 X Q. You were in Leadville on the 30th and 31st days of July, 1882?

A. Yes, sir,

36 X Q. I now read you the following from the Leadville Daily

Herald of July 30, 1882: "The Col. Sellers shaft, on Iron hill, is now down about 215 feet. Some small streaks of ore have already been cut, one of them assaying 19 ounces in silver. The sinking of the shaft is progressing rapidly with prospects that the expected ore body will soon be cut." Do you remember having seen that article or hearing its contents talked about?

Defendants' counsel objects to the question on the ground that it has not appeared nor does it now appear that there was any such extract as plaintiff's counsel states in the Leadville Herald or any other paper, and, further, on the ground that the publication of such statement, even if shown, would not bind the defendants or be any evidence material to the issues in this case.

A. I have no positive recollection of seeing the article alluded to, though if the article appeared in all probability my attention was called to it.

37 X Q. Was it different in any way from the information you were then getting from Maj. Whiting in regard to the appearance of the shaft?

A. The contents of this article?

38 X Q. Yes.

Counsel for the defendants objects on the ground that the question assumes there was such an article and that its contents are as indicated.

A. I have no recollection of Mr. Whiting telling me of a strike of mineral which assayed 19 ounces at that time—that is, on the 30th or 31st of July, 1882.

789 39 X Q. But what about the other appearances and indications in the shaft?

A. As I testified before, they were very encouraging and most favorable.

Redirect examination by Mr. ELIOT:

40 Q. That is, Mr. Whiting so stated?

A. Yes, sir.

41 Q. Did Mr. Whiting ever state to you before July 31st, 1882, that the appearances in the shaft of the Col. Sellers mine were favorable in any other respect than that the porphyry was iron-stained, and that in his opinion they were approaching contact?

A. I think not. I think that he told me nothing except the porphyry was iron-stained; nothing different than that.

42 Q. When Mr. Whiting spoke to you on August 10th, telling you of the cutting of a streak of iron pyrites in the Col. Sellers shaft, did he state at what time such streak was cut?

A. Yes, sir; he stated that it had been cut the night before.

43 Q. Did he state to you at that time or at any time prior to August 10th that the ore body in the mine had been struck?

A. No.

44 Q. Mr. Gerhardt, how long do you say you lived in Leadville?

A. Two years and a half.

45 Q. Can you state from your experiences as a resident of the city of Leadville and as a mining man there whether or not publications were made in the Leadville newspapers with respect to strikes or favorable indications in mines which were not in fact true?

A. Newspaper reports in Leadville were always rather highly colored and gave very flattering accounts of very modest strikes frequently; they were inclined to exaggerate, but it was less true of newspapers published in Leadville than of any other mining camp I know of.

46 Q. But, Mr. Gerhardt, it is in your experience a characteristic of publications in mining camps, is it not?

790 A. Yes, sir; a very strong characteristic.

46 Q. Does it not frequently or has it not frequently occurred that newspapers publish accounts of strikes or favorable indications upon very slight and insufficient information or from persons who have no direct means of knowledge?

A. Well, there is always some foundation for those reports, but as a rule the Leadville papers do not speak of a valuable strike when there is no ore at all encountered.

Recross-examination by Mr. McGINNESS:

47 X Q. You were asked in your redirect examination if Mr. Whiting had mentioned only iron stains as the indication or porphyry, and you stated in your cross-examination that he said the other indications were very favorable indeed.

A. Yes, sir.

48 X Q. Now, in speaking of that iron indication to you, did he say they were faint and infrequent or that they were heavy and frequent?

A. To the best of my recollection he stated that they were heavy and frequent.

49 X Q. Are not the heavy and frequent iron stains at that depth, at the depth that shaft was on July 30 and 31, 1882, very favorable indications of the near approach to the ore body?

A. They are very favorable indications to the near approach of contact.

50 X Q. That is what I mean—that is, ore in Leadville, as I understand?

A. That is in this contact?

51 X Q. That is in the contact which is between the porphyry and limestone.

A. If there is any ore there?

52 X Q. That is what I mean.

A. Yes; the ore is in the contact between the line of porphyry and limestone.

53 X Q. And it was found in that contact in the Col. Sellers?

A. Yes, sir.

54 X Q. All through the whole body of the Col. Sellers

791 ground?

A. Well, through most of the territory that we have explored up to date.

55 X Q. You find that ore body lying in there in that contact between the line of porphyry and limestone?
A. Yes, sir.

Signature waived.
This closed the testimony on the part of the defendants.

I, L. L. Walbridge, special examiner in the above-entitled cause, hereby certify that the foregoing is a true and faithful transcript of the testimony of H. D. Laughlin, John W. Dryden, Eliot C. Jewett, John G. Chandler, E. T. Farish, Henry C. Scott, R. W. Crittenden, Edwards Whittaker, and A. J. Gerhardt, taken before me at the times and place mentioned in the caption hereto; that it was then and there agreed by the parties to said cause, who were respectively represented by counsel at the taking of said depositions, that the testimony of the witnesses might be taken in short-hand, and that my transcript of said short-hand notes might be read in evidence on the trial of said cause with the same force and effect to all intents and purposes as if the same had been subscribed by said deponents.

I further certify that I am not an attorney for either of the parties to said cause and in no way interested in the result thereof.

L. L. WALBRIDGE,
Special Examiner.

792 In the Circuit Court of the United States within and for the Eastern Division of the Eastern District of the State of Missouri.

FRANK J. BOWMAN, Plaintiff,
vs.
WILLIAM F. PATRICK and JAMES M. PATRICK, Defendants.

Depositions taken on behalf of the defendants in the above-entitled cause, before the undersigned, H. J. Bailey, a notary public in and for the county of Arapahoe and State of Colorado, by agreement of the parties.

Proof of the official character of the undersigned as such notary is hereby waived, and said depositions are taken as if a commission had been regularly issued to the undersigned for the purpose of taking the same.

Present on behalf of the defendants, C. C. Parsons, and on behalf of the plaintiff, E. McGinnis, Esq.

December 7th, 1887, 11 a. m., at the office of said notary, Denver, Colorado—

WILLIAM H. WILSON, of lawful age, being first duly sworn, deposes as follows:

Q. 1. State your name, age, residence, and occupation.
A. My name is William H. Wilson; age, forty-five; residence, Jefferson county, Colorado; I am manager at present of the Denver

& Golden Railroad Company; business, speculator generally; operating in mines.

Q. 2. Are you acquainted with the plaintiff, Frank J. Bowman?

A. Yes, sir.

Q. 3. How long have you known him?

A. Since about 1874.

793 Q. 4. Where did you first get acquainted with him?

A. In Jefferson City, Missouri.

Q. 5. Did you know him before you came to Colorado?

A. Yes, sir.

Q. 6. How long have you lived in Colorado?

A. Since March 9th, 1879; I lived at Leadville.

Q. 7. Are you acquainted with the defendants, William F. Patrick and James M. Patrick?

A. Yes, sir; I am.

Q. 8. How long have you known them?

A. I was introduced to Mr. William F. Patrick by Mr. Bowman in Leadville at the time I made the contract with them for the sinking of the Colonel Sellers shaft; I don't remember the date.

Q. 9. That was in what year?

A. I think it was in 1882 or in 1883—somewhere along there.

Q. 10. How long have you known James M. Patrick?

A. I have known James M. Patrick a little over a year; probably two years.

Q. 11. You say you were introduced to William F. Patrick by the plaintiff, Frank J. Bowman?

A. Yes, sir.

Q. 12. Can you state at what time and what place?

A. Yes, sir; my meeting with Mr. Bowman, in Leadville; having the Colonel Sellers property in my hands to negotiate in some way, I presented the matter with other matters to Mr. Bowman and he looked over the ground with me, and he said that he had a young friend there from St. Louis that had been very successful in Colorado, and if he approved of the proposition and would go in with him on it that he would go into the deal; and after driving Mr. Bowman around a day or two he introduced me in the Clarendon hotel at Leadville to Mr. W. F. Patrick, and then stated to me that Mr. Patrick had made some money in the "Aftermath" mine, or some such property as that, over at Kokomo.

Q. 13. Had you previous to your introduction to William
794 F. Patrick gone with the plaintiff up California gulch for the purpose of looking at the Colonel Sellers and Accident mining claims?

A. Yes, sir; and I had not only shown him that—I showed him the McDermoth placer and showed him the Green Mountain Boy mine—the Green Mountain Boy property at Oro—and also showed him some property on East Fryer hill—Cora Bell and Bankok—on Fryer hill. I showed him the location of the A. Y. The Minnie was not in existence then, and I also showed him the Gilt Edge on California gulch.

Q. 14. After you returned from that ride among the mines you

say you were introduced by the plaintiff to William F. Patrick at the Clarendon hotel?

A. Yes, sir.

Q. 15. Did you negotiate on behalf of the owners of the Colonel Sellers and Accident mining claims with the plaintiff and W. F. Patrick for the sinking of the shaft for an interest on the Colonel Sellers and Accident claims?

A. I did, sir.

Q. 16. That contract was made on the 17th of February, 1882?

A. I don't remember the date.

Q. 17. How long before that did you have your negotiation with the plaintiff and W. F. Patrick?

A. My recollection is that a pencil contract—I wrote the contract myself—it was the very evening we got into a conveyance which I furnished and rode up and looked over this ground; went up on Printer Boy hill, and I aimed to explain to Patrick and Bowman the dips of the ore and natural course of the ore from the Iron mine and the A. Y., and then drove them clear across Iron hill and down over Yankee hill, and coming down by the Robert E. Lee. Of course, I was trying to induce them to take hold, as I was getting a commission in the matter, and we stopped at the Clarendon hotel and my stable boy took my team. We went into the Clarendon hotel bar-room, called for something to drink,
795 called up Stebbins and Robinson, who were there by appointment. I wrote myself the pencil contract—I think Bowman copied it—by which the owners of the claims agreed to give W. F. Patrick and Frank J. Bowman a one-half interest in the property, provided they should sink the shaft on it to pay and shipping mineral. My recollection is that I wrote the contract and Bowman copied it.

Q. 18. Was the contract executed at that time or at some subsequent time?

A. It was signed there by Stebbins and Robinson, but they said a man by the name of Simmonds was not present, and it could not be all gone through with, but he would agree to the contract.

Q. 19. Simmonds represented the Glover interest?

A. I don't know what interest he represented.

Q. 20. A brother-in-law of Glover's?

A. I don't know that.

Q. 21. Was there any arrangement between you and the plaintiff by which you were to receive any compensation from him for your services in negotiating that trade?

A. Yes, sir; he agreed to give me a one-sixteenth interest.

Q. 22. In the property?

A. In the property.

Q. 23. How much would that be in the contract?

A. That would be one-eighth of a half. Of course it would not be one-eighth of a whole. One-sixteenth of the whole would be one-eighth of a half and one-fourth of a quarter, one-fourth of his interest.

Q. 24. Was that arrangement carried out between you and the plaintiff?

A. No, sir.

Q. 25. Was any contract drawn up between you by which any interest of the plaintiff was transferred to you?

A. Yes, sir; some months afterwards he was in Leadville stopping at Mr. Patrick's house. I urged upon him the importance of having the contract with him, and he promised to make it, and just before he took the train I called at Patrick's house for it, and he
796 handed me a contract and I read it over, and I saw I had to pay my own assessment work. I saw that my interest was an assessment interest, whereas verbally it was to have been a non-assessible interest.

Q. 26. Was that the understanding?

A. That was the understanding.

Q. 27. Well, what was done?

A. Bowman handed me that and said that he would protect me in it; he would see that I did not suffer at all; he would carry it for me. That was about the effect of his remarks. I protested that it was not according to our agreement, and then he said he understood that I had gotten a commission of twenty-five hundred dollars from the other parties, but he would protect me in this so that there would be no trouble about it. He was just getting into the carriage to go to the depot and I had to accept it.

Q. 28. Was it executed and delivered at that time in Mr. Patrick's house?

A. Yes, sir.

Q. 29. Was that about the sixth of May, 1882?

A. It was some time in May, but I could not say the exact date.

Q. 30. There is a clause contained in that contract that time shall be of the essence of the contract. Do you recollect that?

A. I recollect that very distinctly; I remember that clause very distinctly.

Q. 31. At whose suggestion was that placed in there?

A. Bowman wrote the contract. I didn't know anything about it. I urged him to do it the day that he took dinner with me at my house; that day, I think, and Mr. and Mrs. Patrick also took dinner with me, and on leaving I urged that he should make this contract; that on this contract I could raise a little money; needed some money. At that time I was pretty hard up.

Q. 32. It appears by the contract which has been intro-
797 duced in evidence and marked "Exhibit B" that there was an assignment of your interest in it on the 11th of May, 1882, to John Livesay, Jr. Do you recollect anything about that?

A. Yes, sir; I remember that I placed the contract in Mr. Livesay's hands to raise some money on it.

Q. 33. Did you ever have any conversation with the plaintiff, Frank J. Bowman, in regard to the transfer of your interest in that contract, Exhibit B, to John J. Livesay, Jr.?

A. Not until a good while after it had been transferred.

Q. 34. When was it?

A. About—a little over two years ago, in St. Louis. I think it was some time in October.

Q. 35. October, 1885?

A. Yes, sir; first time I saw him, I think.

Q. 36. Where was the transfer made?

A. I say now in October; it may have been later. I went to St. Louis in October, and early in my visit there I met him in his office. It might have been October or November. I could not say positively which month it was.

Q. 37. You say the conversation was had in his office in St. Louis?

A. Yes, sir.

Q. 38. State what that conversation was.

A. I called to see him, being prominent in this matter. I was there on mining business. In fact, I called to see if Bowman did not want to go into some mining-properties operations and presented one to him, and in the course of the conversation I suggested to him that he had done me a very great injury in not holding on to his interest in the Sellers, and asked him if he did not feel like having himself kicked for giving up his interest. He said, No; he was not a man to cry over spilled milk. He was in a big scheme with Tallmadge and others down in Texas and he thought he would come out all right; that he was very glad Patrick had made a success of it. He had always treated him nicely, and he had nobody
798 to blame except himself. Those were about his words.

Q. 39. Did he say why he blamed himself?

A. No; I think he gave as an excuse that he was in some railroad speculation through the State and he had lost a good deal of money on it and was not able to carry his assessment on these operations he had gone into.

Q. 40. Did he give that as a reason for not going on with the Colonel Sellers venture?

A. I don't know as he made it as an explicit reason. I told him that had he have carried his interest in that and complied with his verbal contract with me that I should have been getting twenty-five hundred or two thousand dollars a month instead of Livesay getting it, and he would have been getting seven or eight thousand a month instead of the other parties who had interests in it. I also censured him—that had Bowman and Patrick and myself had interests in other operations besides those—and I went on to explain to him the developments of the camp and what the output would be and how much money he would have made if he had stuck to his agreements. He said to that he had lost money having been in this railroad, and because he lost the money was not able to carry the assessments.

Q. 41. Not able to carry the Colonel Sellers contract?

A. Not able to carry the assessments. I spoke of them in a general way, you know.

Q. 42. State whether or not in that conversation you stated to

him that you had assigned your interest in the contract to John Livesay, Jr.

A. Oh, yes; I stated that; told him about this man having a little pawn-broker's shop and being broke and then getting twenty-two to twenty-five hundred dollars a month.

Q. 43. Did I understand you to say that you told him that Livesay was now getting $2,500 a month on the interest you assigned to him instead of your getting it?

799 A. Yes, sir; I told him that; probably I told him without very good authority, but it was my opinion that interest was paying about that much.

Q. 44. Were you in another scheme with Bowman and W. F. Patrick?

A. Yes, sir.

Q. 45. Relating to some mining interest near Leadville?

A. Yes, sir.

Q. 46. What was that?

A. That was a bond on the McDermoth placer, a property up at Oro.

Q. 47. How far from the Colonel Sellers property?

A. I should judge it was about 2,000 feet or 3,000, maybe; between two and three thousand feet.

Q. 48. Did you and W. F. Patrick and Bowman have an option to purchase that property for any length of time?

A. Yes, sir.

Q. 49. How long?

A. My recollection is twelve months. I am not positive about that. It is a matter of record and I would not like to put down on record as stating the exact option.

Q. 50. Was anything paid on that option?

A. Yes, sir.

Q. 51. How much?

A. Five hundred dollars.

Q. 52. Who paid it?

A. I paid it for Patrick.

Q. 53. Did Patrick furnish the money?

A. Yes, sir.

Q. 54. Did Bowman pay anything, the plaintiff?

A. Not that I know of.

Q. 55. And that option was finally given up, was it?

A. Oh, yes; we abandoned the property.

Q. 56. And all that was paid on it was paid by W. F. Patrick—the $500 you mention?

A. All that I know of.

Q. 57. Have you ever had any conversation with the plaintiff, Frank J. Bowman, since the one you have detailed as having taken place since October, 1885, concerning this matter?

A. Yes, sir; I have had several conversations with Bowman since this suit was instituted.

800 58 Q. Before that?

A. I do not remember any before that except the one referred to.

(No cross-examination.)
(Signature of witness waived to above deposition by consent of counsel.)

DECEMBER 8TH, 1887—11 a. m.

T. C. STEBBINS, of lawful age, being first duly sworn, deposes as follows:

Q. 1. State your name, age, residence, and occupation.
A. T. C. Stebbins; age, thirty-nine; residence, ranch in Jefferson county, Colorado; ranchman and miner both, you might say.
Q. 2. How long have you resided in the State of Colorado?
A. Nearly ten years; very close to ten.
Q. 3. When did you first commence your residence, if at all, in Leadville, Colorado?
A. About the first of July, 1878.
Q. 4. How long have you lived in Leadville and when did you quit residing there?
A. I quit residing there in the spring of 1884.
Q. 5. And did you live there continuously from about the first of July, 1878?
A. I don't know what you would call continuously. I was away a good deal of the winter of 1883–'4, and then I came back to Leadville, stayed there a couple of months and came down to Denver to live, but I had not given up my residence there until that time. I left there in the spring of 1884; went there in 1878.
Q. 6. Were you one of the locators of the mining claims known as the Colonel Sellers and the Accident Lode mining claims?
A. Yes, sir; one of the original. They are situated in California mining district, on Iron hill, in Lake county, Colorado.
801 Q. 7. Who was your associate in the location of said claims?
A. Lyman Robinson. He is the only one that appears of record, so far as the record is concerned.
Q. 8. Were you one of the owners of said claims in the month of February, 1882?
A. Yes, sir.
Q. 9. Are you acquainted with the plaintiff, Frank J. Bowman?
A. Yes, sir; I met him—met him that once—just once.
Q. 10. When did you become acquainted with him and under what circumstances?
A. I think it was about the middle of February, 1882, that I met him there and was introduced to him there. Major W. H. Wilson, Robinson, and I were looking for some parties there to take hold of the property, and I was introduced to him as probably the party I was looking after to take hold of the property.
Q. 11. Were you acquainted with the defendant William F. Patrick?
A. Yes, sir.

Q. 12. Did you know the defendant James M. Patrick at that time?

A. No, sir.

Q. 13. Were you a party to a contract made by the owners of the Colonel Sellers and Accident claims and Frank J. Bowman and William F. Patrick, dated on the 17th of February, 1882?

A. I was the party that made the contract with them, but I didn't make any contract with Mr. Patrick.

Q. 14. State the circumstances of that contract.

A. As I previously stated, Major Wilson had introduced me to Bowman with the understanding that probably he was the man I was after, so I think it was in the morning of the 16th or 17th of February I met them by appointment, and we went up to the property and I showed Mr. Bowman the property; Mr. Wilson accompanied us; showed all its advantages to the best of my knowledge—
its location principally—of course there was no mineral
802 there then—and after staying some time on the property he and Wilson left me and went over to Breese hill, on the other side; said they would meet me in the afternoon about three or four o'clock. I returned to Leadville, and I think it was about three or four that I met them on their return, and we were in the office of the Clarendon hotel, and Bowman told me then he would accept the proposition and for me to draw him an outline of what was understood—what I demanded in the contract; and so we got the basis of the contract there and Major Wilson was with us, and Bowman suggested that we adjourn to the bar-room and take a drink, and we went in to the bar in the Clarendon hotel—we three, Major Wilson and Bowman and myself. I drew an outline of this contract, a sketch, a synopsis; he was to leave that night on the train for Denver and told me then he was to meet the party here who should go in with him; I didn't know it was Patrick; he didn't mention the name. The synopsis was taken to Mr. Parsons to fill out and we then sent the contract on to the different owners of the property and it was signed in full and returned and the deeds placed in escrow under agreement.

Q. 15. The deed for one-half?

A. Yes, sir; a deed for one-half; that was the agreement.

Q. 16. You spoke of taking Mr. Bowman to the Colonel Sellers and Accident properties and pointing out the advantages?

A. As regards to its location.

Q. 17. What advantages did you point out?

A. Principally its location, as I say, on account of its being adjacent to the Minnie and A. Y., which was the nearest property that had developed anything; we had every reason in the world to believe that the ore chute ran right through our property and was continuous, and Mr. Bowman became convinced of the fact as I showed
him there, and I supposed that was the very reason he agreed
803 to take hold of it; there was nothing else to show; could not show anything else; there was no mineral developed on the property.

Q. 18. Had any mineral been disclosed on the property up to that time?

A. No; no mineral in place; nothing that would necessarily be an encouragement to any man to think that there was mineral anywhere, only where common evidences of mineral might occur.

Q. 19. Had any of the workings upon the claim up to that time disclosed any mineral in rock in place?

A. No, sir.

Q. 20. Do you know when work was commenced on the property in pursuance of that contract that you say you made with Bowman and Patrick?

A. I think it was about the middle of March following. Patrick and I went up on the property and we located the shaft where I thought it was proper it should be sunk, as it was afterwards, and I think the very following day, along about the 16th or 17th of March of that year, his contractor went up with his tools and things to go to work, but didn't.

Q. 21. Why not?

A. Well, there was some other fellows there that claimed the property.

Q. 22. Under what location?

A. Under a location called the Little Hope, I think.

Q. 23. Well, did they interfere with the contractor sinking the shaft?

A. Yes, sir.

Q. 24. What was the result of that?

A. The result was we had them arrested and tried before a justice of the peace there as trespassers and they were bound over to the grand jury and the grand jury indicted them, and after the indictment there was no further action taken in the matter; but on the advice of our attorneys, Bissell and yourself (Mr. Parsons), we thought the proper thing to do was to proceed according to law and sink our shaft in place and see if we could get there first. As a mat-
804 ter of location and as the prior parties, we had the prior right, complied with the law previous to that; and we eventually got mineral first and secured our title. They adversed us on our application for patent, but that was overcome by a transaction.

Q. 25. You may state, if you remember, what arrangement was made by the jumpers in regard to the indictments that were found by the grand jury against them.

A. They were annulled upon the understanding that we should hold our privileges upon the property the same as they. It was only a question of who should find mineral first and prove up title to the property, and on the agreement to that effect the indictments were annulled.

Q. 26. Subsequent to that was each party allowed to work on their respective claims without interference?

A. No; they interfered with us.

Q. 27. I am talking about the agreement?

A. Oh, was that the agreement? Yes, sir; that was the agreement.

Q. 28. Then, did your contractor resume or did the contractor under Patrick and Bowman resume the work of sinking the shaft on the Colonel Sellers claim?

A. Yes, sir.

Q. 29. Do you recollect any obstruction to that occurring subsequently?

A. Yes, sir; they used giant powder and injured our shaft for a considerable distance at one time, so much so that Patrick and his partners were quite discouraged, and Robinson and I had to give them a bond of indemnity to *net* them to proceed with their work.

Q. 30. Indemnifying them against what?

A. Against any loss or further interruption—against the case of blowing up the shaft, I believe that was it.

Q. 31. Do you know where that bond is?

A. No; I do not, Mr. Parsons. Might possibly be with the papers, wherever they are.

Q. 32. Were you present by day watching the development
805 of the Colonel Sellers property and the sinking of the shaft under the Bowman and Patrick contract?

A. Not day by day. I was there very often.

Q. 33. Did you assist in the work there?

A. Not until after mineral had been struck.

Q. 34. Do you recollect when the main ore body was encountered in said shaft?

A. It was encountered about the last day of August.

Q. 35. Before that had there been anything resembling mineral encountered in that shaft?

A. Well, there was mineral found, what you might call a string of ore. The last one we found was, I think, about 25 or 30 feet above the bottom of the shaft, before we struck the main body of mineral. It was of no particular value, because it was nothing, only iron pyrites and gangne matter.

Q. 36. The shaft cut it going down through what formation?

A. In block porphyry. They were very common, though, these stringers of ore.

Q. 37. Do you mean common in that shaft?

A. No; common in that formation.

Q. 38. Can you state about when a little stringer or seam of iron pyrites, of which you have spoken as having been encountered in block porphyry, was struck?

A. I think it was probably a couple of weeks before we struck the main body; the 14th or 15th of August.

Q. 39. 1882?

A. Yes, sir.

Q. 40. How much experience have you had in mining?

A. Actual experience, about six years.

Q. 41. Principally in Leadville?

A. Yes, sir; principally in Leadville.

Q. 42. Had experience in other counties of the State?

A. Yes, sir.

806 Q. 43. What counties?

A. Gunnison and Pitkin and Chaffee.

Q. 44. I will ask you from your experience as a mining man whether or not you know or are familiar with the occurrence of seams or stringers of iron pyrites in block porphyry

A. They are common, as I say, in that porphyry formation in Leadville, and especially on Iron hill. I had seen them several times before in different shafts that were there.

Q. 45. As a mining man do you consider the occurrence of these seams of iron pyrites in the porphyry of any value?

A. No, sir; for the simple reason that I had seen a great deal of porphyry that was mineralized itself and yet was nowheres near where the mineral in its proper formation should be. I have seen iron pyrites impregnated in blocks of porphyry and I have seen these stringers of ore in gangue matter and iron pyrites principally, and very rarely you would see a speck of galena, just principally iron.

Q. 46. Is iron pyrites of any value?

A. No; not as a general thing.

Q. 47. You may state whether or not you attached sufficient value to the seam of iron pyrites, of which you have testified, to follow it.

A. Oh, we never followed it; its natural inclination was such that it took it out of the shaft in a very few feet; we lost it entirely long before we struck the main body of mineral.

Q. 48. Does the occurrence of iron pyrites in block porphyry lead to the main ore bodies?

A. Well, that I could not state, for the simple reason I have never followed one of them.

Q. 49. Do you know, from your experience as a miner, whether or not these stringers of iron pyrites in porphyry pass out entirely, leaving no trace behind?

A. Well, I think I know of the evidence of one or two
807 cases where they have just simply occurred in little stringers in block porphyry and had not hardly a beginning or end, you might say, just a small crevice in the porphyry; of course, I have never followed one of them to any great extent, and so cannot tell where they would eventually lead to, but I have seen them here far above the main body of mineral. I hardly think it was possible they would lead there, even it they were followed.

Q. 50. Were you at the shaft at the time the main ore body was uncovered, about the last of August, 1882?

A. Yes, sir; I was there.

Q. 51. State what the condition of the shaft was at that time with reference to water.

A. Our opening of the main body of mineral let in a tremendous flow of water, and any further work was impossible.

Q. 52. Did you take any measures to control the water?

A. Yes, sir. A steam pump was tried there, and I took up a boiler myself and tried a steam pump and could not handle the water, and tried several different ways and could not handle it until we put in this present plant; got it during the winter of 1883. The

water poured in so hard it was utterly impossible to get to see the bottom of the shaft.

Q. 53. From the time you struck the main body of ore until the spring of 1883 was the shaft in such a condition that you could not see the bottom of it or see the mineral you had struck?

A. No; we could not. There was a large amount of water in. Just exactly what the measurement of the water was I do not remember. It was a considerable depth; sufficiently so; it was an utter impossibility to see the bottom of the shaft.

Q. 54. Do you remember when you commenced shipping mineral?

A. I don't remember the exact date; I think it was along the spring of 1883—possibly along in the fore part of April; along there.

808 Q. Did you sell or dispose of any of your interest in the month of July or August, 1882?

A. Yes, sir; I can't tell the exact month. It was somewhere along there, I believe—in July, 1882.

Q. 56. To whom?

A. Major Whiting and Gerhart. I think the deed was made to Gerhart. I always understood they were partners in the interest: I sold them a sixteenth interest.

Q. 57. For how much?

A. $2,500.

Q. 58. Was it two thousand? Whiting testified——

A. (Interposing.) I believe it was two thousand.

Q. 59. He was to pay $500 at a time?

A. Yes, sir. It was sold before any development of any consequence had been made in the property, or, of course, I would not have sold it that cheap.

Q. 60. Have you ever met the plaintiff, Frank J. Bowman, since that contract was made?

A. I am under the impression that I have not, although he was in Leadville, I think, in May, that year, but I don't think I met him at that time; still I would not take oath to that matter.

Cross-examination:

X Q. 1. You say you sold him that in the latter part of July—to Gerhart and Whiting?

A. I can't tell the exact date; of course, the records will show that.

X Q. 2. You say you sold to Whiting and Gerhart in July, 1882, before any development of consequence was made?

A. Yes, sir.

X Q. 3. What developments not of consequence, in your judgment, had been made prior to that time?

A. Well, there was this work going on in this shaft by Patrick and Bowman. All other developments previous to that had been done by different parties, as well as Robinson and myself. We had connected with the properties, but nothing of any consequence had

been developed. As I say, we based our valuation of the property entirely upon its location, being adjacent to the Minnie and A. Y.

809 X Q. 4. This seam or streak of iron pyrites that you describe as having been encountered some time about the 13th or 14th of August, 1881, describe that, please. What was its thickness from the top to the bottom of the seam; what angle of inclination did it come into the shaft and how far did it go into the shaft?

A. Why, it came in on the—I think what you might term on the west side of the shaft. Its angle of inclination was such it took only about ten feet to run it out of the shaft by crossing and disappearing on the opposite side. It was not perpendicular.

X Q. 5. So you cut through it; the shaft went through it?

A. Yes, sir. It came in on one side and went out on the other. The inclination of all the formation is the same there—the seams in the block porphyry.

X Q. 6. Were there any seams of iron pyrites cut prior to that that you know of in that shaft?

A. As near as I can remember, I think there was one cut previous to that higher up, but I would not be positive about it.

X Q. 7. What would have been to a miner of three years' experience and an assayer who knew what ore was and who was in charge of the sinking of that shaft in July, 1882—what would have been at that day—then the shaft was about 215 feet deep—an encouraging appearance of that shaft, to take that kind of a man?

A. I think the strongest encouragement he could ever have would have been mineral in place. The only encouragement that any man could have had there was the fact of its location; that is all, and there was no very near developments as regards to that; but there was every evidence from the surface indications that there was no break between us and adjacent property, and we had, as I said, every reason to believe that the ore chute continued right on through. It was a gamble to a certain extent.

X Q. 8. That was an indication you derived from the sur-

810 face and surrounding property?

A. Yes, sir.

X Q. 9. I will limit you to the encouraging appearance of the shaft itself at that depth.

A. I don't know of anything that would have been an encouraging appearance unless it would be mineral itself.

X Q. 10. Don't you know that the streaks of iron pyrites bearing silver, with a decomposed condition of the porphyry, was considered by mining men of that camp as an encouraging appearance in a shaft?

A. It is the evidence of mineral to some extent. Just where the mineral is I don't know. It is some indication. It is not mineral and is not a certain indication, but it is a subindication. I have had the world by the heels so often in my mining experience I do not consider anything a positive indication until I get the mineral itself. I have had a great many of these fissures and crevices that have never demonstrated anything of value.

X Q. 11. They may afterwards fail?

A. Yes, sir.

X Q. 12. But they may encourage you to go on?

A. As I said, I did not undertake to follow it through from the shaft.

X Q. 13. Haven't you known ore bodies themselves to go out suddenly and unexpectedly?

A. Yes, sir; mining is a venture. You don't know what your next shot is going to bring you.

X Q. 14. Therefore, encountering these seams of iron pyrites bearing some silver and from the decomposed state of the porphyry, they were some indications at least that the ore body may be near?

A. Well, to the peculiar style of a man that a miner is most everything to him is encouraging.

X Q. 15. Suppose you had a man who was an assayer and knew what ore was—had three years' experience as a miner and who was a very cool, calculating man and not enthusiastic, but given to understating a thing—to such a man what would be an en-
811 couraging appearance of the shaft itself, leaving out surrounding property?

Objected to for the reason that the witness is called upon to testify as to what facts might influence another party of which he could not have any possible knowledge and as not calling for any statement of fact.

A. I cannot tell you what the influence would be on other parties, to that kind of a man. We are all constituted differently. What might be hope and encouragement to me might be discouragement to another party.

X Q 16. But suppose that other man has that degree of knowledge and has that mental constitution that is not enthusiastic and given to understanding things.

A. I think if a man, any man, that ever followed mining as a living or followed it as his profession and calling for the sake of gain that he would take almost anything as encouraging, as the evidence of mineral. That is the way I look at it. Of course, what this other man would do I don't know. What might encourage me might discourage him, or *vice versa*.

(Signature of witness to his deposition waived by consent of counsel.)

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

I hereby certify that the foregoing depositions of William H. Wilson and T. C. Stebbins were taken before me, a notary public in and for the county and State aforesaid, at Denver, Colorado, on behalf of the defendants in a cause pending in the circuit court of the United States within and for the eastern division of the east-
812 ern district of the State of Missouri, entitled Frank J. Bowman, plaintiff, *vs.* William F. Patrick and James M. Patrick,

defendants, pursuant to the agreement between respective counsel appearing on the first page of the deposition of said Wilson herein; that said Wilson's deposition was taken on December 7th, 1887, whereupon an adjournment was had to December 8th, 1887, at which time the deposition of said Stebbins was taken. Counsel, Mr. Parsons (for defendants) and Mr. McGinnis (for plaintiff), were both present at said examinations.

That prior to his examination each witness was by me sworn to testify the truth, the whole truth, and nothing but the truth in the cause above entitled; that said depositions were stenographically reported by me, and that the foregoing are full and true transcripts thereof. Signatures of witnesses to their testimony were waived by consent of counsel, as was also proof of my official capacity.

Witness my hand and official seal December 10, 1887.

H. J. BAILEY,
[SEAL.] *Notary Public.*

(My commission expires March 8, 1889.

DENVER, COLORADO, *December* 10, 1887.

Wm. F. and James M. Patrick to H. J. Bailey, Dr., for services, &c., in case of Bowman *vs.* Patrick *et al.*, U. S. circuit court, eastern division eastern district Missouri, as follows:

	One copy depositions of witnesses Wilson and Stebbins, to be sent to said court, at 25 cents per folio (said charge including attendance as stenographer, taking and transcribing same, 66.5 folios)	$16 62
	Attendance as commissioner and notary, one day	2 00
	Administering oaths to two witnesses	20
813	Certificate	50
		$19 32

December 10, 1887.—Rec'd payment in full of above.

H. J. BAILEY.

In the Circuit Court of the United States within and for the Eastern Division of the Eastern District of the State of Missouri.

FRANK J. BOWMAN, Plaintiff,
vs.
WM. F. PATRICK and JAMES M. PATRICK, Defendants.

By consent, depositions of witnesses in behalf of the plaintiff may be taken now before H. J. Bailey, notary public, Arapahoe county, Colorado, December 9th, 1887.

Depositions taken on behalf of the plaintiff in above-entitled cause before the undersigned, H. J. Bailey, a notary public in and for the county of Arapahoe, Colorado.

By agreement of the parties, proof of the official character of the undersigned as such notary is hereby waived, and said depositions

are taken as if a commission had been regularly issued to the undersigned for the purpose of taking the same.

Present: For plaintiff, E. McGinnis, Esquire; for defendant, C. C. Parsons, Esquire.

JOHN LIVESAY, Junior, of lawful age, being first duly sworn, deposes as follows:

Q. 1. Where do you reside, Mr. Livesay?

A. I reside in Denver, Colorado.

Q. 2. What is your age?

A. I am 39.

Q. 3. Were you in Leadville in July, 1882?

A. Yes, sir.

814 Q. 4. What, if any, connection had you at that time with the Colonel Sellers and Accident mines?

A. I was interested as one of the owners under that contract with Bowman and Wilson.

Q 5. Were you watching the development of it in the latter part of July, 1882—the shaft of the Colonel Sellers?

A. Yes, sir.

Q. 6. State, if you know, what was found there in the latter part of July, in that shaft, in the way of indications of mineral.

A. Well, I don't know as I can say that anything was found there in particular, Mr. McGinnis.

Q. 7. What was found so far as you know?

A. The porphyry was iron-stained and very good indications.

Q. 8. Any streaks of mineral, seams of iron pyrites, that you know of?

Objected to as leading.

A. Well, now, I can't say exactly whether it was in the latter part of July. It seems to me along the latter part of July or the first of August, somewhere along there, there was a little seam of pyrites. That is about as near as I could remember about it.

Q. 9. Did you ever purchase an interest from Stebbins in that property?

A. Yes, sir.

Q. 10. Was it before you bought from Stebbins—before you me the agreement to buy from Stebbins—that these little seams of iif pyrites were found?

A. I think it was in the latter part of July some time that I bought from Stebbins. I don't remember exactly the date; it seemed to me it was in July. It was on the strength of the porphyry being stained.

Q. 11. And what else?

A. Well, I can't say whether it was at that time or not; whether we had pyrites of iron in the shaft or not.

Q. 12. What is your best impression?

815 A. It is my impression that there was a small streak there—some right along—either the latter part of July or the first of August. I cannot say exactly.

Q. 13. Mr. William Patrick testified that some time in May, 1882, Stebbins and Robinson made a note payable to him individually for $394.85 for expenses caused by repairing the damage caused by the blowing up of the shaft of the Colonel Sellers. When did you first hear of the existence of that note?

A. Not until you mentioned it to me the other day.

Q. 14. Since I came down from Leadville?

A. Yes, sir; that is the first I heard of there being a note.

Q. 15. Since Patrick's deposition was taken in this case at Leadville?

A. Yes, sir.

Q. 16. Did Mr. Patrick ever pay back to you any part of the proceeds of that note received from Robinson and Stebbins?

Objected to as immaterial and irrelevant.

A. Not as I remember; he might have done so in some of the settlements, but not as I remember.

Q. 17. You never heard of the note until I told you a few days ago?

A. No, sir.

Q. 18. You have no recollection of ever getting back any of the money?

A. No, sir.

Cross-examination:

X Q. 1. You say that in July, 1882, you purchased an interest in the Colonel Sellers and Accident mining claims from T. C. Stebbins. Now, you may state what interest you purchased in those claims in that month.

A. It was one sixty-fourth in the Sellers and two sixty-fourths in the Accident.

X Q. 2. You say that you purchased it on the strength of the improved condition of the shaft. I will ask you what you paid
816 Stebbins for one sixty-fourth in the Colonel Sellers claim and two sixty-fourths in the Accident at that time.

A. I paid him $250.

X Q. 3. Did you pay it all at once?

A. No, sir; he did not want it all at once; he didn't ask for it. He did ask me, but we made an arrangement. I think I paid him 25 or 50 dollars first payment, and whenever he wanted five or ten or twenty-five dollars he came in and got it. I gave him a note and a deed at the time.

X Q. 4. How much was the note?

A. I can't tell you exactly; it was twenty-five or fifty dollars I paid him. Whatever it was I gave him a note for the balance and he came in and got money, and whenever he got money he would put it on the note.

X Q. 5. But the entire arrangement—entire amount for $\frac{2}{64}$ in the Accident and $\frac{1}{64}$ in the Colonel Sellers—was $250?

A. Yes, sir.

X Q. 6. And he executed a deed to you for the property based on that consideration?

A. Yes, sir.

X Q. 7. I will ask you whether you have ever had any practical experience as a miner working under ground.

A. No, sir.

X Q. 8. Did you examine the Colonel Sellers shaft in the month of July, 1882?

A. Well, I was down in the shaft perhaps once or twice a week while we were sinking it.

X Q. 9. I will ask you if you know that there was any other indications of the improved condition of that shaft in the month of July than the iron stain of the porphyry rock.

A. I can't say positively that there was any other indication at that time; I am not certain. It was somewhere about either the latter part of July or the first of August; that is as near as my memory carries me at present.

X Q. 10. Don't you know as a matter of fact that there was
817 no indications of iron pyrites in the shaft until the 13th of August, 1882?

A. No, sir; I don't know as a matter of fact. I have given it just as I remember, Mr. Parsons. The 13th of August we had some pyrites of iron.

X Q. 11. Do you know—are you able to swear positively that there was or that you encountered anything like iron pyrites before the 13th of August, 1882?

A. I think, Mr. Parsons, we had a little pyrites before that.

—. Was there any vein or seam or stringer—a well-defined stringer of iron pyrites?

A. It seems to me, as near as I can remember, there was a little seam of pyrites before the 13th of August, and I can't put the date, but it seems to me it was before that.

X Q. 12. Have you any definite recollection upon the subject?

A. Nothing more than just as I remember.

X Q. 13. Did you make any memorandum of it?

A. No, sir.

X Q. 14. Have you to-day any memorandum or anything by which you are enabled to fix the date before the 13th of August?

A. No, sir; nothing more than I have stated.

X Q. 15. So that you might be mistaken about that when you depend simply upon your memory, might you not?

A. I might be, but I think that I am right as my memory goes.

X Q. 16. At what depth in the shaft did you encounter the iron pyrites in the month of July, 1882?

A. Mr. Parsons, I cannot remember about the depth of it. The shaft ought to have been along about that time about two hundred and fifteen or twenty feet.

17 X Q. Who else saw this indication or this deposit of iron pyrites you have spoken of besides yourself?

A. I don't know.

18 X Q. Who went down the shaft with you when you saw it, or did you see it at all?

818 A. Well, it may have been along that time, Charley, that I saw this, as I told you—this streak of pyrites, as I remember.

19 X Q. Did you see any streak of pyrites before the first of August?

A. As I can remember at present. It seems to me there was a little streak of pyrites before the 13th of August—somewhere about the first; I cannot tell you exactly when.

20 X Q. Who went down the shaft with you when you saw it, if you saw it at all?

A. Well, Jack, seems to me, went down. Jack Drummond went down—used to go down with me, and Patrick used to go down sometimes.

21 X Q. Did Patrick go down with you when these iron pyrites were encountered before the first of August, if any such was encountered?

A. No; I cannot state that, because he went down. I think *he* went down several times together, but I cannot tell when. I know we went down several times together. I used to go up with him.

22 X Q. If you remember, which side of the shaft was there disclosed any iron pyrites prior to the first of August, 1882?

A. It seems to me it was on the upper side of the shaft.

23 X Q. Did it dip to the north?

A. I don't remember that.

24 X Q. You have not any definite recollection of the time that the iron pyrites were disclosed or the dimensions of the streak, if any such there was, nor the depth of the shaft nor any other thing incident to that vein, have you—to that deposit?

A. The depth of the shaft——

25 X Q. You have no definite recollection, I say, about any of these things?

A. No, sir; well, I think the shaft ought to have been at that time about two hundred and fifteen to twenty feet.

26 X Q. Not what it should have been. You have no definite recollection of what it was at that time?

819 A. No, sir; no definite recollection.

27 X Q. All you base your statement on is a sort of vague, indifferent memory, is it not?

A. Yes, sir; I think it is; you might call it that.

28 X Q. You might be mistaken about that, might you not?

A. Yes, sir; I might be mistaken; I am liable to correction, but as near as I can remember I think it was about that time.

29 X Q. Now, you stated that you never heard of a note being given by Robinson and Stebbins to W. F. Patrick until you were told of it by Mr. McGinnis; I will ask you if you did not know that in May, 1882, at the time of the blowing up of the shaft of the Col. Sellers, that Patrick hesitated about going on with the work, and that Robbinson and Stebbins then came in and indemnified them against the expenses incident to the repairing of the shaft.

A. Yes; I think that was so.

30 X Q. You knew that at the time?

A. I did not know that he received a note.

31 X Q. Did you know that there was an indemnity bond given by Robinson and Stebbins to Patrick for the expenses incurred in blowing up or repairing that shaft after it was blown up?

A. Yes; I think I—as I remember, there was an agreement given to Patrick about it.

32 X Q. That was known to all the owners at the time, was it not?

A. I don't know whether it was known to all the owners or not.

33 X Q. And as to whether a note was given, you say you have no recollection of that.

A. No, sir.

34 X Q. You say you might have known it, but if you had you have forgotten it?

A. Yes; I will say that.

35 X Q. As to whether Patrick has ever settled with you for your proportion of that note you do not now recollect?

A. No, sir.

820 36 X Q. You have had a great many business transactions and money transactions with Patrick from that time to this, have you not?

A. Yes, sir.

37 X Q. And it might have been settled in one of these different transactions and settlements you have had with him, might it not?

A. Yes, sir; it might have been, but I do not think it has been, Mr. Parsons.

38 X Q. You have no recollection of it?

A. No, sir; I have no recollection of it at all.

39 X Q. Have you ever made a demand upon Patrick for a settlement of that note and of the proceeds of the note?

A. No, sir; I never made any demand on him.

40 X Q. There have been money transactions between you and him between that date and up to the present time?

A. Yes, in different ways, not relating to that.

41 X Q. And Mr. Patrick is perfectly responsible, is he not?

A. I should think he was; yes, sir.

42 X Q. And you have never had any difficulty in settling any claim that you had against him from that time to this?

A. Never.

43 X Q. Never has hesitated to pay you anything due to you?

A. No, sir.

44 X Q. In relation to this Col. Sellers mine, he has never dealt with you except as an honest, square man, has he?

A. Never, sir.

45 X Q. And if you have any claim against him to-day you know you can have it discharged and paid, can't you?

A. Yes, sir; I should think so.

46 X Q. Now, I will ask you if you know when the main ore body in the Col. Sellers shaft was encountered.

A. Well, the main ore body was encountered the latter part
821 of August—I think it was the thirtieth of August, 1882.

47 X Q. You were there at that time, were you not?

A. Yes, sir.

48 X Q. And at the same time you struck a tremendous flow of water, did you not?

A. Yes, sir.

49 X Q. Which drowned out the shaft?

A. Yes, sir.

50 X Q. And that water continued to cover the bottom of the shaft from the thirtieth of August, 1882, up to about the first of March, 1883?

A. Yes; the water kept on the bottom of the shaft; we managed it for a few days when we struck the ore body, and then we had to give it up.

51 X Q. You tried to use a steam pump, and then a steam head, with a Cornish pump?

A. Yes, sir; a steam pump and steam head. I think Patrick was away at that time. We broke an arm on the steam head, and the men came down to my house in the morning and told me about it. It had given out in the night—somewhere about three or four o'clock in the morning. They broke the arm off. Patrick came back, and we got a steam pump—a Cornish pump.

52 X Q. You never saw the bottom of that shaft from the first day you struck mineral on the thirtieth of August, 1882, until about the first of March, 1883, did you?

A. No, sir.

53 X Q. From the last of August, 1882, you say, to the first of March, 1883?

A. Yes, sir.

54 X Q. At the time you were working that shaft in the month of July, 1883, you were having a race for mineral against the jumpers who had located the Little Hope lode, were you not?

A. Yes, sir.

55 X Q. And it became important to know who had discovered mineral first, did it not?

A. Yes; that is the way they talked.

56 X Q. You understood at that time your title to the property depended upon your securing mineral first, did you not?

A. Well, it did some little, but we had the prior——

822 57 X Q. Prior possession?

A. Prior possession of the property and the better right.

58 X Q. Of course you could not see that the jumpers had any right there at all?

A. No, sir.

59 X Q. But you knew it depended in a great measure upon your striking mineral in rock in place first?

A. They thought it would raise a question of law.

60 X Q. You had been advised before that by your attorneys that you could not maintain an action for injunction against the jumpers because you had no valid discovery of mineral—advised that you

could not obtain an injunction against the jumpers because you had no valid discovery of mineral?

A. Yes; that was understood, I think.

61 X Q. That was the reason the injunction was not applied for?

A. Yes.

62 X Q. Did you not know, as a matter of fact, that you never felt secure in your title until after the 13th of August, 1882; was not that discussed among you?

A. Yes; I think that is so.

63 X Q. And don't you know, as a matter of fact——

A. (Interrupting:) On the 13th of August we had iron pyrites.

64 X Q. On the 13th of August you struck a little seam of iron pyrites?

A. Yes; a seam of iron pyrites.

65 X Q. In the block porphyry?

A. In the porphyry. It was iron-stained all through the porphyry, and the porphyry was getting soft.

66 X Q. Was not that the first time you had encountered anything like a seam or stringer or iron pyrites?

A. No, sir; it seems to me, Charley, there was a little seam above that, as near as I can recollect, as I stated.

67 X Q. And it is only, you now say, a vague or indefinite
823 matter of memory?

A. Yes, sir.

68 X Q. Don't you know as a matter of fact that these little seams or stringers of iron pyrites occur all through the porphyry rock? Don't you know it is a frequent occurrence in sinking a shaft through porphyry or have you not had experience enough to know that?

A. I don't think that it is a frequent occurrence all through the porphyry.

69 X Q. I do not mean all through, but it frequently occurs in the porphyry?

A. I think it occurs when you approach—are beginning to get close to mineral.

70 X Q. Do not you know as a matter of fact that it occurs frequently five or six hundred feet above?

A. It may be.

71 X Q. Do you not know the porphyry rock itself is often mineralized, will assay something that you call impregnation in porphyry?

A. Yes; I have seen that when it is getting towards mineral.

72 X Q. Have you not seen it away above, several hundred feet above the mineral?

A. I don't know as I ever saw that several hundred feet above the mineral.

73 X Q. Did you pay your proportion of the expenses of working the mine from the time you obtained the Wilson interest down to the time the mine was placed upon a paying basis?

A. Yes, sir.

74 X Q. You obtained the Wilson interest on the eleventh day of May, 1882, did you not?

A. Yes, sir.

75 X Q. And the first payment you made on that interest was on the 28th day of June, 1882, was it not?

A. Yes, sir; I think it was.

76 X Q. Have you any way of fixing the exact date that you made that payment?

A. (Consulting paper:) Yes, sir.

77 X Q. I now read to you a receipt you have just handed me as follows: "Received of J. Livesay, Jr., one hundred and eighty-
824 four dollars and thirty cents ($184.30) in full of all amounts due on first contract for one hundred feet of shaft in Col. Sellers and Accident lodes. Signed W. F. Patrick. Dated Leadville, June 28, 1882," and ask you whether that is the first payment you made upon your share of the expense of sinking that shaft.

A. Yes, sir; that is my check that I paid him (exhibiting paper).

78 X Q. That represents one-eighth interest, does it not, in the contract?

A. Yes, sir.

79 X Q. Are you acquainted with the plaintiff, Frank J. Bowman?

A. No, sir.

80 X Q. Did you ever meet him?

A. No, sir.

Redirect examination:

81 X Q. Did you ever have any telegraphic or written communication with Bowman in your life?

A. No, sir; I do not know him at all.

The signature of the witness is waived by agreement of parties.

U. S. Circuit Court, in the Eastern Division of the Eastern District of the State of Missouri.

F. J. BOWMAN
vs.
WILLIAM F. PATRICK *et al.* } No. 2732.

To J. C. Whiting:

You are hereby commanded to appear before me, a notary public within and for the State of Colorado and county of Arapahoe, at my office, room 30, Barclay block, corner of 18th and Larimer streets, Denver, Colorado, at the hour of half past one, then and there to testify in behalf of the plaintiff in the above-entitled cause on Dec. 9, 1887.

[SEAL.]

H. J. BAILEY,
Notary Public.

825 J. C. WHITING, of lawful age, being sworn for the plaintiff, testified as follows:

Q. 1. Were you in Leadville during July, 1882?

A. I was.

Q. 2. Mr. A. J. Gerhart, who has testified in this case, says that on the last of July, 1882, you mentioned to him that some iron pyrites had been encountered in the shaft of the Col. Sellers mine; is that correct?

A. Yes, sir.

Q. 3. About what time was that encountered, so far as you recollect?

A. In the very last days of July, somewhere near——

Q. 4. Is or is not iron pyrites in that formation on Iron hill—Col. Sellers shaft—an indication of the nearness of mineral?

A. I think it is; I took it to be such at the time.

Q. 5. Did you buy any interest in the Col. Sellers mine from Mr. T. C. Stebbins?

A. I did; yes, sir.

Q. 6. What time did you make the agreement with him for that purchase, about?

A. I think it was on the 28th of July that I entered into that contract.

Q. 7. What year?

A. 1882.

Q. 8. What induced you to seek to buy an interest in the Col. Sellers at that time?

A Well, I looked the property over for several days, and the indications were such as to warrant me to make my investment.

Q. 9. What about the matter of the shaft—the matter coming out of the shaft; are these the indications to which you refer?

A. Yes; all surroundings and the general appearance of the shaft induced me to believe that it was a dead shot. In fact, I remarked to Gerhart when I asked him if he wanted to go in with me, in the very inception of the thing, that if he didn't get it there pretty soon there was no need of looking for it anywhere, because the indications were very good indeed.

826 Counsel for the defendants moves to strike out the statements of the witness as to what he remarked to Mr. Gerhart as being incompetent, irrelevant, and immaterial.

Q. 10. The indications in the shaft at that time were very good, were they?

Objected to as being leading and suggestive to the witness.

A. Very good, indeed.

Cross-examination:

X Q. 1. You state that some iron pyrites were discovered on the last day of July, 1882. State at what depth in the shaft the iron pyrites were encountered.

A. As to the matter of depth in the Col. Sellers shaft at that date I have only the testimony of others. I never measured the shaft; and in my testimony given before in this case I simply stated the depth which I understood at the time existed, and I can't state to the exact depth at which the shaft was when I bought in or when these indications were apparent.

X Q. 2. Did you see the iron pyrites, of which you have just testified, in the shaft on the last of July, 1882?

A. I won't say it was exactly the last day, but it was in July some time.

X Q. 3. Did you see it?

A. I took it down to Mr. Gerhart's store. I took it down and showed it to Gerhart. I brought it from the Col. Sellers shaft.

X Q. 4. Do you mean to say that the iron pyrites of which you have just testified was taken from the solid formation of the Col. Sellers shaft?

A. Taken from the Col. Sellers shaft.

X Q. 5. Do you know whether it was placed in there by other parties or where it was taken from?

A. Oh, it is not likely it was placed in there, because I was
827 examining that shaft. I had a contract to buy in there and I was following every development of it.

X Q. 6. Did you examine the place at which this mineral or iron pyrites of which you have testified was taken?

A. Can't say that I did. I don't remember of doing so.

X Q. 7. What part of the shaft did you take it from?

A. I took it after it was hoisted from the shaft.

X Q. 8. Took it from the dump?

A. From the dump or the bucket, I don't remember which.

X Q 8. At that time there was a race between the Col. Sellers and Little Hope locators for mineral, was there not?

A. Yes, sir; at that time both parties were endeavoring to strike mineral in place first.

X Q. 9. And you have formerly testified that the jumpers proclaimed a discovery before they actually made one?

A. Yes, sir; I have testified to that effect.

X Q. 10. Wasn't there some of the same kind of work going on in the Col. Sellers shaft for the purpose of influencing the community?

A. I don't know that to be the fact.

X Q. 11. You have testified in your former examination that the very first indications of mineral that were found in the Col. Sellers shaft was on the 13th day of August, 1882, and that you were very careful to note the exact time, because you were watching it day by day, and that you made a memorandum of the discovery at that time, and know that was the day at which the mineral was discovered?

A. Yes, sir; it was with a view to settling the question as to who had struck mineral in place, so as to settle the question of title. I don't remember of testifying otherwise than that. That was testimony

which was very necessary as the circumstances then existed. I am testifying now as to the indications before that time.

828 X Q. 12. Where was this mineral that was found—that you say was found in July; in what formation was it found?

A. Well, at that time in July, the shaft, of course, was nearly in porphyry, iron-stained, and indicative of the near approach as I looked at it of mineral.

X Q. 13. What was the extent of the deposit found in the last of July?

A. Well, as to the extent of the deposit, I don't know that I could testify that it was of any great extent; but all the testimony that the rocks gave at that early date after my buying in was very good.

X Q. 14. I am talking about the time when the iron pyrites of which you have testified was found in July. The question is as to the extent of the deposit?

A. Well, as to the extent of the deposit I say I can't testify.

X Q. 15. Was it a vein or stringer of ore, or just simply some iron pyrites that were found as impregnations in the porphyry?

A. Well, there is a difference between impregnations of porphyry with iron pyrites and a bunch of pyrites in the porphyry.

X Q. 16. That don't answer the question.

A. Well, it was not iron pyrites then as impregnations in the porphyry.

X Q. 17. Well, describe it if you ever saw it.

A. It was a bunch of iron pyrites taken out of the shaft and not a bunch of porphyry impregnated with pyrites.

X Q. 18. State the exact date in July in which you say you found this mineral.

A. I think it was the last day of July, although I would not be certain.

X Q. 19. You say you took it from the dump?

A. I didn't say that; I said I either took it from the dump or the bucket; I took it from what was being hoisted at the time I was there.

X Q. 20. Did you examine the place from which it was taken?

829 A. No; I didn't that I remember.

X Q. 21. Did you ever see the place from which it was taken?

A. I don't remember about that.

X Q. 22. Can you state the depth at which it was taken?

A. I told you I could not state any depth in the shaft at all from my own knowledge, for I never measured the shaft.

X Q. 23. Did you say anything in your testimony that was taken under a commission issued from the circuit court of the United States in St. Louis about the iron pyrites of which you have just testified?

A. I don't think I did.

X Q. 24. You were asked then to state fully the condition of the shaft during the months of July and August, were you not?

A. As to that I don't know.

X Q. 25. When did you first give the information to the counsel for the plaintiff concerning which you have just testified?

A. I don't remember that I ever gave him that information.

X Q. 26. How did he know what you would testify to?

A. Mr. Gerhart's testimony possibly put him onto it.

X Q. 27. Have you ever had any consultations with him concerning this before this time at which your testimony is being taken?

A. I think he asked me about that and I told him that was correct.

X Q. 28. When?

A. That I don't remember.

X Q. 29. Was it in Leadville or in Denver?

A. I can't state.

X Q. 30. Did you have frequent conversations with plaintiff's counsel while he was in Leadville recently?

A. Not very frequent conversations.

X Q. 31. About how many did you have?

A. Oh, I met him two or three times in a casual way.

X Q. 32. Was this matter discussed between you while he was in Leadville?

830 A. This matter of Gerhart's testimony I think was referred to once. I met him by accident in an office in Leadville.

X Q. 33. In what office?

A. Well, I think it was Judge Weston's office.

X Q. 34. Did you then tell him that you had discovered iron pyrites in the Col. Sellers shaft in the last of July, 1882?

A. I think I told him that that testimony of Mr. Gerhart's was correct, but that I had not, as I was a volunteer witness in the case, dwell upon that fact, because it was one that didn't seem to me material at the time, and I did not know what its bearing was to-day I had read Gerhart's testimony.

X Q. 35. At whose instance did you come here to-day from Leadville?

A. I came here on my own business, Mr. Parsons, and was subpœnaed in this case.

X Q. 36. You were subpœnaed?

A. Yes, sir.

X Q. 37. Where?

A. Here.

X Q. 38. Were you subpœnaed after you came here?

A. Yes, sir.

X Q. 39. Did you come with any understanding or arrangement with plaintiff's counsel about being here to-day?

A. I have not talked with plaintiff's counsel at all.

X Q. 40. Answer the question.

A. No, sir.

X Q. 41. You knew of the fact of which you have just testified, concerning iron pyrites, in July, 1882, when your testimony was formerly taken in this cause, did you not?

A. Yes, sir; I knew it then as well as I know it now.

X Q. 42. You had read Gerhart's testimony before your deposition was taken before, had you not, in my office?

A. Gerhart's testimony was shown me by you and I read it.

X Q. 43. Didn't you state at that time that Gerhart was mistaken as to the date?

A. I think not; don't remember of saying anything of the kind.

831 X Q. 44. Don't you remember of stating to me that Gerhart had got mixed in his dates; that that really occurred on the 13th of July instead of the 13th of August?

A. I don't remember of saying anything about that; I don't think I did state that, because I have a letter from Gerhart in respect to this whole matter and had it before that time in which the dates are accurately located, but not with any reference to this matter.

X Q. 45. Didn't you state to me at that time, when you furnished me a synopsis of a letter that you got from Gerhart, that Gerhart was mistaken as to the date that the iron pyrites was encountered?

A. No; I don't remember of stating that.

X Q. 46. Will you swear that you didn't say so?

A. I think I can, because I don't see why I should.

X Q. 47. Didn't you say in that same conversation to me that you had a memorandum which showed the exact date upon which the first indications of mineral were reached in that shaft?

A. No; the exact date of the first discovery of mineral in rock in place is what I was aiming at.

X Q. 48. Didn't you say to me in that conversation that your memorandum showed that Gerhart was mistaken as to the first indications of mineral in the shaft on the 13th of July instead of August?

A. No; I have no memorandum of that kind that will prove anything of the sort or would lead me to make any such statement; what memorandum I have was on the actual discovery of ore in place on the 13th of August.

X Q. 49. Isn't it a fact that before the 13th of August there were no indications of the existence of mineral except that porphyry was heavily iron-stained?

A. No; I don't think that is a fact; the porphyry was heavily iron-stained, as I testified; I took down a piece of the pyrites ore, as I have testified; it is a fact that the actual discovery of ore
832 in place, which was the only point that we wanted to fix beyond peradventure, was made, as I testified, according to my memorandum on the 13th of August, and I was very careful to trace the course of that discovery thoughout.

X Q. 50. Have you ever stated to any one connected with this case or to Mr. Patrick or myself or any one before that day that there were iron pyrites discovered in that shaft before the 13th of August, 1882?

A. I don't remember of having any conversation about that, because the question had never been put to me.

X Q. 51. Haven't you and I discussed this whole matter at different times, and especially after you had read the testimony that was taken in St. Louis, and didn't you say to me that the very first mineral that was encountered in that shaft was on the 13th of August, 1882?

A. You and I have had a good many conversations about this matter, and I have stated that the very first discovery of ore was made on the 13th of August, 1882; and I said that deliberately, because that date had been fixed by me; it was necessary to fix it, and I wanted to settle the questions of the claimants, of which there were two, and I didn't believe we ever had any discussion about any indications in the shaft above that actual discovery. I don't think I have ever discussed it with you, Mr. Parsons.

X Q. 52. You have been asked in your former examinations to state all that you knew about that shaft, were you not?

A. Yes, sir.

X Q. 53. And in your answers at that time you said nothing about this iron pyrites?

A. Nothing at all.

X Q. 54. Now, since that time you have had some difficulty with W. F. Patrick, have you not?

A. Before that time and since that time, yes; sir.

X Q. 55. You have recently had difficulty with him, have
833 you not?

A. He has tried to make a difficulty with me.

X Q. 56. And you have some feeling against him, have you not?

A. In that respect I have some little feeling; yes, sir.

X Q. 57. And since your late difficulty with him you have felt disposed to do him any harm you could, have you not?

A. No; I don't think so; I have not shown that disposition.

X Q. 58. That ill feeling towards him exists at the present time, does it not?

A. Not particularly; no, sir.

X Q. 59. He has charged you with having embezzled some of the funds of the Col. Sellers mine, has he not?

A. Never put it in that way, sir.

X Q. 60. Hasn't he charged you with using money and taking money from the funds of the company and converting it to your own use?

A. He has charged me with what he has been guilty of himself.

X Q. 61. He has charged you with what I have stated, has he not?

A. He stated that my account is overdrawn; that is the broadest statement he makes.

X Q. 62. Didn't he charge you with other irregularities in relation to the financial management of the company?

A. He made one or two charges which I showed him were not true.

X Q. 63. Didn't he charge you with having checked out money for your own use and so fixing the accounts that it did not appear on the books of the company?

A. He did; and he could not—I showed him that he charged falsely.

X Q. 64. Didn't he state to you that he had discovered checks that you had drawn on the funds of the Col. Sellers mine that were used for your own benefit and not for the use of the company?

A. Most all the checks that I drew against the Col. Sellers mine in my own name I used for my own benefit and not for the use of the company.

834 X Q. 65. That does not answer the question.

A. I think it does.

X Q. 66. I ask if he has not charged you with having done that.

A. I don't know that he did.

X Q. 67. I will ask you further if you have not got an arrangement with himself and other owners of the company by which you are to surrender the management of the company on the first of January.

A. No, sir; no such arrangement. I have not seen but two owners of the company.

X Q. 68. And if you haven't agreed that you will secure the amounts that you have taken from the funds of the company by the first of January.

A. No, sir; no such arrangement.

X Q. 69. Nothing of that sort?

A. No, sir.

X Q. 70. What is the arrangement?

A. Mr. Patrick and Mr. Simmonds, who were two of the owners of the company, came into the office and Mr. Patrick made certain complaints; they represented two out of a possible ten. Their talk with me was to a certain point, and possibly they understand certain things which may or may not be done; that is all the arrangement there is.

X Q. 71. Is that all you care to disclose about the difficulty?

A. That is all I care to disclose about that.

X Q. 72. Mr. Patrick and Mr. Simmonds represent a majority interest in the mine, do they not?

A. I think not.

X Q. 73. What interest does Patrick represent?

A. Mr. Patrick and Mr. Simmonds together represent one-half, which is not a majority.

X Q. 74. What interest do you represent?

A. I represent my wife's interest, a one thirty-second, and possibly some others which may appear at a later date.

X Q. 75. Mr. Patrick has demanded that you resign the position as manager of that mine, has he not?

835 A. He has made some such demand; yes, sir.

X Q. 76. Has also demanded that you secure certain overdrafts?

A. He has made such a demand, sir.

X Q. 77. And you have promised to do it, haven't you?

A. I have not. I promised to do what was right in the matter, as

it shall appear. I also make some demands which it is not necessary to go into.

X Q. 78. Do you desire to take back or change anything respecting your testimony formerly given in this case?

A. I don't know that there is anything I stated in my former testimony that was not stated with full belief in its truth, and I don't know of anything that I want to take back.

X Q. 79. And you reiterate the statements of your former deposition taken in this case as true, do you?

A. I think they are true to the best of my knowledge and belief. I testified willingly, freely, frankly, and voluntarily.

Signature of witness waived by consent.

It is admitted that the law in the State of Colorado in regard to interest has been from the first day of January, 1882, to date, the following three sections, viz., section- 1706, 1707, & 1708 of the General Statutes of Colorado:

"1706. (SECTION 1)—The legal rate of interest on the forbearance or loan of any money, when there is no agreement between the parties, as specified in section three of this act, shall be at the rate of ten per centum per annum.

1707. (SECTION 2)—Creditors shall be allowed to receive interest, when there is no agreement as to the rate thereof, at the rate of ten per centum per annum, for all moneys after they become due, on any bond, bill, promissory note, or other instrument of writing, or any judgment recovered before any court or magistrate authorized to enter up the same within this State, from the day of entering up said judgment until satisfaction of said judgment be made; likewise on money lent, on money due on the settlement of account from the date of the last just entry that may have been made in account, on money received to the use of another and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay.

836 1708. (SECTION 3)—The parties to any bond, bill, promissory note or other instrument of writing, may stipulate therein for the payment of a greater or higher rate of interest than ten per cent. per annum, and any such stipulation contained in any such instrument of writing may be enforced in any court of law or equity in the State."

STATE OF COLORADO, } *ss:*
County of Arapahoe, }

I hereby certify that the foregoing depositions of John Livesay, Jr., and J. C. Whiting were taken before me, a notary public in and for the county and State aforesaid, at Denver, Colorado, on behalf of the plaintiff in a cause pending in the circuit court of the United States within and for the eastern division of the eastern district of the State of Missouri, entitled Frank J. Bowman, plaintiff, *vs.* Wil-

liam F. Patrick and James M. Patrick, defendants, pursuant to the agreement between respective counsel appearing on the first page of the deposition of said Livesay herein; that said Livesay's deposition was taken between the hours of 11 a. m. and noon, December 9, 1887, and an adjournment had to 1.30 p. m. of said day, when the deposition of said Whiting was taken. Counsel, Mr. McGinnis, for plaintiff, and Mr. Parsons, for defendants, were both present at said examinations; that prior to his examination each witness was by me sworn to testify the truth, the whole truth, and nothing but the truth in the cause above-entitled; that said depositions were stenographically reported by me, and that the foregoing are full and true transcripts thereof. Signatures of witnesses to their testimony were waived by consent of counsel, as was also proof of my official capacity.

Witness my hand and official seal December 10, 1887.

[SEAL.] H. J. BAILEY,
Notary Public.

(My commission expires March 8, 1889.)

837 DENVER, COLORADO, *December* 10, 1887.

Frank J. Bowman to H. J. Bailey, Dr.

For services, &c., in case of Bowman *vs.* Patrick *et al.*, U. S. circuit court, eastern division, eastern district Missouri, as follows:

One copy depositions of witnesses Whiting and Livesay, to be sent to said court, at 25 cents per folio (said charge including attendance as stenographer, taking and transcribing same), 76 folios	$19 00
Attendance as commissioner and notary, one day	2 00
Issuing subpœna for witness (Whiting)	50
Administering oaths to two witnesses	20
Certificate	50
	$22 20

Dec. 10, '87.—Received payment of above in full from E. McGinnis, Esq., pl'ff's att'y.

H. J. BAILEY.

838 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record, pleadings, proceedings, and proofs in case No. 2732, of Frank J. Bowman, to and for the use and benefit of Dennis P. Slattery, plaintiff, against William F. Patrick, defendant, as fully as the same remain on file and of record in said case in my office.

Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this seventh day of October, in the year of our Lord eighteen hundred and eighty-nine.

A. P. SELBY,
Clerk of said Court,
By —— ——, *Deputy.*

[Endorsed:] No. 2732. United States circuit court, eastern division of the eastern judicial district of Missouri. Frank J. Bowman, to and for the use and benefit of Dennis P. Slattery, against William F. Patrick. Duly certified transcript of the record, pleadings, proceedings, and proofs in the above-entitled cause.

Endorsed on cover: Case No. 13,742. E. Missouri C. C. U. S. No. 157. William F. Patrick, appellant, *vs.* Frank J. Bowman, to the use of Dennis P. Slattery. Filed October 12, 1889.

149 U.S. 411

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

CASE NO. 13742.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM NO. 157.

WILLIAM F. PATRICK, *Appellant*,

vs.

FRANK J. BOWMAN, TO THE USE OF DENNIS SLATTERY, *Appellee*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, ASSIGNMENT OF ERRORS AND BRIEF FOR APPELLANT.

CHARLES C. PARSONS,
Solicitor for Appellant.

C. J. KELLY, PRINTER, DENVER.

CASE NO. 13742.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

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WILLIAM F. PATRICK, *Appellant*,

vs.

FRANK J. BOWMAN, TO THE USE OF DENNIS SLATTERY, *Appellee*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, ASSIGNMENT OF ERRORS AND BRIEF FOR APPELLANT.

STATEMENT.

This is a suit in equity, brought to set aside a deed made October 19, 1882, by appellee, Frank J. Bowman, conveying to appellant, William F. Patrick, the one-fourth interest in certain mining property, known as the Col. Sellers and Accident lode mining claims, near Leadville, Colorado, and for an accounting as to past profits upon that interest. The facts, as disclosed by the evidence, are as follows:

February 17, 1882, T. C. Stebbins, Lyman Robison,

and others, claimed to own the possessory title to the Col. Sellers and Accident mining claims, near Leadville, Colorado. At that time, no valid location of these claims had been made, for the reason that no discovery of mineral in rock in place, or otherwise, had been made within the boundaries of the two claims, as required by the mining acts of Congress.

On the day last named, the appellee, Frank J. Bowman, and the appellant, William F. Patrick, entered into a written contract (Rec. pp. 299–301) with Stebbins, Robison, and others, whereby, in consideration, and upon completion, of an agreement of Patrick and Bowman to sink a good and substantial shaft upon that property, to limestone in place or bed-rock, unless pay mineral should be found in said shaft before reaching the limestone in place or bed-rock, and to make application for patent title to said mining claims, and to prosecute diligently said application until patents should be obtained,—the work of sinking said shaft to be commenced within thirty days from the date of the contract, and continued with no intermission exceeding ten days at any one time (unless the inclemency of the weather should prevent), until pay mineral or limestone in place be reached,—a deed for one-half of said mining claims, which had been executed contemporaneously with said contract and placed in escrow, should be delivered to the said Patrick and Bowman. The object of requiring a shaft to be sunk to limestone in place or bed-rock was because, in the Leadville district, mineral is found in a contact having a porphyry hanging wall and a limestone foot wall, so that, if the shaft penetrated the porphyry and reached the limestone in place without a discovery of mineral, it was considered among the miners as useless to sink further (Rec. p. 448).

In this venture, Bowman and William F. Patrick were to contribute equally the money necessary to complete it. Patrick was to remain at Leadville, and superintend the work. Bowman lived at St. Louis, Mo. He was in Leadville at the time the contract of the 17th of February, 1882, was entered into, and testifies that he drew the original pencil draft of that contract. It also appears in evidence that Bowman originated this enterprise, and first called the attention of William F. Patrick to the property and to the

opportunity to procure an interest in it, in consideration of its development as hereinbefore stated. The preliminaries being arranged, Bowman returned to St. Louis, and Patrick remained at Leadville. Soon thereafter, Patrick made a contract with one Drummond to sink the shaft 100 feet from the surface, at the price of $10 per foot, exclusive of timber, payments to be made as successive depths of 25 feet were reached (Rec. p. 304–5).

March 18th, work was commenced on the shaft (Rec. p. 305). About the same time, and until mineral was reached, the ground covered by the Col. Sellers and Accident claims was located, and partly occupied, by parties spoken of in the proofs as "jumpers," who claimed it under a location known as the "Little Hope" lode claim. These jumpers commenced and continued to sink a shaft on the Little Hope claim, about 125 feet from the shaft then being sunk by Bowman and Patrick (Rec. pp. 304–5). After some legal proceedings against the jumpers, a truce was made with them, and it was agreed that each party might continue working in their respective shafts, neither actually interfering with the other. It was believed that the party *who first found mineral in rock in place would own the property*, because of prior discovery of mineral under the mining acts of Congress (Rec. pp. 305, 445). From this time on, it was a race of diligence between Patrick and Bowman on the one hand, and the claimants of the Little Hope location on the other (Rec. p. 304). Patrick and Bowman employed and worked three shifts, and pushed the work day and night (Rec. p. 305). Bowman desired an application to be made for an injunction against the Little Hope claimants; but this was not done, because Patrick's counsel, at Leadville, advised that an injunction would not be granted, for the reason that no valid discovery of mineral had yet been made within the Col. Sellers and Accident claims, and, therefore, no title had yet vested in the locators of those claims (Rec. pp. 305, 316, 322–3).

March 16th, immediately upon letting the contract to Drummond, Patrick wrote to Bowman notifying him to that effect (Rec. p. 258). March 18th, he again wrote to Bowman, notifying him that, besides the $1,000 to be paid Drummond, the timber for the first 100 feet of the shaft would cost about

$350, and, in the letter of March 16th, requested Bowman to remit $500 for these expenses (Rec. p. 259). To this request, Bowman did not respond. Again, on April 1st, Patrick repeated in a letter to Bowman the information as to the contract with Drummond, and again requested Bowman to send him $500 (Rec. p. 259). To this call also, to sustain his proportionate share of the burdens of this venture, Bowman paid no heed.

March 25th, Bowman sold to James M. Patrick one-third of his interest in the contract of the 17th of February, but agreed to remain bound for one-half of the entire expense of the shaft; it being agreed that he, Bowman, should carry such one-third interest for the period of one year from the date of the sale (Rec. p. 215). Subsequently, June 25, 1882, James M. Patrick gave his note to Bowman for the sum of $245.75, being the proportionate share of the expenses of sinking the shaft, assessed, up to May 8th, upon the interest acquired by the former (Rec. pp. 210, 410).

April 13th, W. F. Patrick wrote to Bowman, stating that the shaft was then down to the depth of fifty feet, and that the second payment to Drummond was about due (Rec. p. 260). Bowman ignored this call.

May 8th, or thereabouts, Bowman was in Leadville, and conveyed to William H. Wilson one-fourth of his original interest in the contract of February 17th, provided that Wilson should assume and pay one-fourth of the expenses (Rec. pp. 307–8). Wilson's failure to pay within ten days after demand was to work a forfeiture (Rec. p. 309). About the same time, Patrick explained to Bowman what expenses had been incurred by him in sinking the shaft, and showed him that the entire amount due up to that time, including what Patrick had paid out, was $1,474.50, of which Bowman's share was $737.25, in case Wilson should not pay, or $184.30 less in case Wilson paid (Rec. pp. 310–12). Patrick told Bowman that he did not believe Wilson would pay, but that he would make demand upon him (Rec. p. 314).

Patrick conceded a credit, claimed by Bowman from the former, on account of matters not connected with this enterprise, which would reduce the balance from $737.25 to $465, in case Wilson should not pay, or to $184.30 less than that sum if Wilson paid (Rec. pp. 310, 312). Still Bowman

did not pay, but requested Patrick to draw on him at St. Louis for the amount due, according as Wilson did or did not pay (Rec. p. 312). Bowman then returned to St. Louis, and thereafter Patrick made demand on Wilson, who refused (Rec. p. 314).

May 13th, Patrick drew his draft on Bowman at St. Louis, for $465. Upon presentation, Bowman refused payment, and the draft was returned, protested (Rec. pp. 312–13). Still Bowman paid nothing. Upon refusing payment of this draft, Bowman telegraphed to Patrick, May 15th, as follows: "Must know Wilson's conclusion; rebates not satisfactory; answer at once" (Rec. p. 315). On the same day, Bowman wrote to Patrick, complaining that Patrick had drawn on him without either collecting from Wilson, or securing his relinquishment, and stated that he would be off to Chicago in an hour (Rec. p. 316). He afterwards told James M. Patrick that he dishonored the draft because he had not the funds to pay it (Rec. p. 413). In this same letter, Bowman asked, "Has the injunction suit been filed? *Do not contract for further expense until it has been;* telegraph me" (Rec. p. 316).

May 21st, to this last letter, Patrick replies (Rec. 261):

"Yours of the 15th was received yesterday. On Tuesday morning, our shaft in the Col. Sellers was blown up by giant powder, and injured to the extent of several hundred dollars. As the contract was not finished, the loss is not on us, but on the contractors. I delayed writing to you about it, in the hope that we might find and arrest the guilty party. Of course, we know that the other party who are working on the same claim instigated it, but as yet we have no proof which is sufficient for a criminal action. The application for the injunction has not been commenced yet, as several of the best attorneys here have advised against it, and say that the Judge would not grant it owing to the fact that as yet we have no mineral in place, and that, therefore, our claim is not a legal one. The only way we can save ourselves (printed erroneously 'our silver') is to go ahead and beat them to mineral, which we can easily do, notwithstanding the delay. If we can prove beyond a doubt that they had the shaft blown up, which we are now trying to do, we can obtain an injunction, otherwise I am informed there is little hope for it. *If you do not feel disposed to go ahead under these circumstances,* I think I can find some one else who will go on with me. I gave Wilson notice on the 8th of May that his money was due, and, as he only has ten days in which to pay, he has forfeited his contract and is out. In regard to my draft on you. I told you that I had no idea Wilson would pay, and that I would draw on you for the full amount, $465, and, in case Wilson did pay, I would return it to you. *That was our agreement,* and yet, in spite of that, you telegraphed 'rebates not satisfactory.' I certainly do not like to be treated that way. I answered your telegram just as soon as it was delivered to me. By looking in your note book, you will see the two amounts, $280.69 and $465, and you said you would instruct the Boatmen's to pay either amount."

Notwithstanding this remonstrance, Bowman paid no attention until Patrick sought him in St. Louis. Between May 8th and June 19th, Patrick had paid out $603.75 for ad-

ditional expense in sinking the shaft, so that, on the latter day, Patrick had expended $2,078.25, for joint account of himself and Bowman, who, thus far, had contributed nothing (Rec. pp. 317–18). Patrick had also contracted for sinking the shaft a second 100 feet, at $19 per foot, thus incurring a further liability of $1,900 (Rec. p. 317).

May 11th, Wilson assigned to one Livesay his interest acquired from Bowman, then forfeit by failure to pay the assessment thereon. Patrick declined Livesay's offer, without Bowman's assent (Rec. pp. 319–20), and advised the latter of this offer, by letter dated June 3rd (Rec. p. 400).

June 19th, Patrick at St. Louis, effected a settlement of accounts with Bowman, and was instructed to let Livesay pay the $184.30, and take the one-eighth interest intended for Wilson (Rec. pp. 320, 322); Bowman said he was short of funds, and could not pay even up to May 8th, as had been agreed upon in Leadville (Rec. p. 319).

Although Patrick's expenditures and liabilities amounted at this time to over $2,000, all he could get from Bowman was his note, at ninety days, for $288.70, the balance due from him up to May 8th, which was reduced to that amount by the credit claimed by Bowman against Patrick, and by the assessment against the Wilson interest which had not then been paid, and which represented the amount due originally from Bowman reduced as above stated on that day. Bowman neither paid nor settled for any portion of the $603.75 expended by Patrick since May 8th, nor gave any assurances that the additional liabilities to be incurred would be met by him. Bowman said he was "hard up," and could not settle the expenses incurred since May 8th. He asked Patrick to wait awhile for him, as a matter of accommodation. Patrick explained to Bowman that he was in need of money himself; he was compelled at this time to borrow $4,000, on his own credit, to enable him to carry on the work (Rec. pp. 318–19, 321).

Patrick informed Bowman that he had let the contract for sinking the shaft through the second 100 feet, at the price of $19 per foot (Rec. p. 320); that it was necessary that the work should be pushed vigorously to mineral, to beat the jumpers (Rec. pp. 217, 219). Bowman was dissatisfied with this course (Rec. p. 363), and urged

upon Patrick that only a little work should be done every ten days in the shaft, so as to save a forfeiture of their contract. Patrick replied that he did not think that would save the forfeiture, but that, on returning to Leadville, he would consult his attorneys. They advised him that such a course would cause a forfeiture, and a loss of what had been expended already (Rec. pp. 322–3).

At this interview, Bowman offered Patrick all his interest in the enterprise, if Patrick would return the note that Bowman had just given him. Patrick replied that he had as much already as he could carry, but that, on his return to the West, he would speak to a man whom he thought might take the offer (Rec. p. 322).

Bowman told Patrick that he would leave St. Louis soon for Wisconsin, and that his address, during the Summer, would be Bayfield (Rec. p. 321). Patrick started for Leadville, June 19th (Rec. p. 322); and Bowman went to the Wisconsin woods, on a hunting and fishing expedition. Bowman testified that he gave no attention to business during these trips. (Rec. p. 157, 159).

June 22nd, on his way from St. Louis to Leadville, Patrick wrote, *inter alia*, to Bowman, at St. Louis, as follows (Rec. p. 262):

"In regard to your interest in the Col. Sellers, I think I know a man who will pay the note you gave me, $288.69, and take your interest off your hands, and let me go right ahead with the work which I would very much like to do. If you are willing to let it go on these terms, *which is the same proposition you made me in your office*, please telegraph me immediately, and I will try to make the arrangement."

June 27th, he wrote, *inter alia*, from Leadville, to Bowman, at St. Louis, thus (Rec. p. 276):

* * * "I would also like to have an answer in regard to the proposition *I made you* about the Col. Sellers, *to return you your note and forfeit your share in the contract. There is a party here who will take it.*"

June 28th, Patrick, at Leadville, wrote, *inter alia*, to Bowman, at St. Louis, the following (Rec. p. 293):

* * * "Please let me know what we are to do * * * about the Col. Sellers, as I am anxious to continue work on that property and see what is there."

Patrick then waited a week, and, hearing nothing from Bowman, consulted his attorney as to the course he should pursue. By that time, Patrick had been obliged, in addition to disbursements embraced in his settlement with Bowman, of June 19th, to pay out $2,539.35 for work in the shaft, of

which $952.32 was due him from Bowman (Rec. pp. 327–8). He was seriously embarrassed by having to provide the funds necessary for these payments, borrowing money in St. Louis, as well as selling government bonds, hypothecating street railway stock, and borrowing money at the banks at Leadville.

July 5th, by his attorney's advice, Patrick stated an account of his disbursements (Rec. p. 326), and sent it in the following letter (Rec. pp. 324–5):

"Leadville, July 5, 1882.

"Mr. Frank Bowman, Merchants' Hotel,
"St. Paul, Minn.

"Dear Sir: I send you a statement of all amounts paid on the Col. Sellers contract since our settlement, from which you will see that the amount due from you thereon is $952.32, for which amount I will draw on you to-morrow. I wish to notify you, and hereby do so, that, if the draft is not paid, that I will apply to Stebbins and Robison and their partners for a new contract in my own name. I have consulted an attorney here, and am satisfied that we are obliged to continue the work in order to comply with our contract, and that your plan of doing a little work every ten days would not be acting according to its letter or spirit, and would cause a forfeiture of the contract and loss of the amount we have spent in sinking the first 100 feet. The same attorney also tells me that, under our contract, if you do not pay your proportion when called upon, you forfeit your rights under said contract. I want to deal fairly with you, and will tell you that, *in my opinion, the shaft,* which is now 165 feet deep, *is looking very promising, and I think we are not very far from the contact.* My reasons for thinking so *are the porphyry is now heavily iron-stained.* Hope you will pay the draft, and that we may continue the work together, but, if you do not, I will have to protect myself, and will do so by taking a new contract as I have said. I withdraw my offer to return your note for $288.70, dated June 19, 1882, in case you assign your interest in the contract to me.

"Yours truly,
"W. F. PATRICK."

Patrick directed this letter to the Merchants' Hotel, St. Paul, because he thought he had received some notice of that being Bowman's address (Rec. pp. 362, 366).

July 6th, Patrick drew a draft on Bowman at the Merchants' Hotel, St. Paul, for $952.32, and sent it through his bank at Leadville, to a bank at St. Paul. This draft was not paid, and was returned to Patrick (Rec. p. 327).

From the time when the letter of June 22d was written, up to the time when Bowman's deed was delivered to Patrick, October 19th following, Bowman never made any inquiry of Patrick about the mine, the stage of development, the cost thereof, nor offered to pay anything on account of it, nor made any inquiry as to his liability growing out of the enterprise (Rec. p. 337).

July 14th, at Leadville, Patrick received a telegram from Bowman, dated, Ashland, Wisconsin, July 13th, in the following words (Rec. p. 329):

"Yours of June 22nd received yesterday. *Proposition accepted.* Send note
"FRANK J. BOWMAN."

July 16th, at St. Paul, Bowman wrote to Patrick, at Leadville, as follows (Rec. p. 332):

"St. Paul, Minn., July 16, 1882.

"Mr. W. F. Patrick.

"Dear Sir: * * * When I came out of the woods, I found your letter of June 22nd waiting my answer, and I telegraphed you, on the same day, accepting your proposition to surrender to you all my remaining interest in the property adjoining the A. Y., on your surrending my note; and, on a perusal of your subsequent letters, received here at St Paul, to-day, I learn that is your wish. I do not complain of it. My judgment differs from yours as to the course to pursue, and I should not stand in your way and will not. If you wish any papers signed, send and I will sign them. My address is Bayfield, Wisconsin. * * *

Yours truly,
"FRANK J. BOWMAN."

Patrick received this letter at Leadville in due course of mail, about July 20th or 21st (Rec. p. 331). After receiving it, Patrick offered the interest, thus acquired from Bowman, to Col. Bissell, on the same terms that Bowman sold it, and, as late as October, Patrick offered it to Whiting, at what it had cost him (Rec. p. 349). Bowman afterwards stated (Rec. p. 527) to the witness Wilson that his reason for selling out to Patrick was that he "was not able to carry the assessments." He made substantially the same statement to the witness William Patrick (Rec. p. 135), and to James M. Patrick (Rec. p. 417).

It appearing, from Bowman's letter of July 16th, that he had not received Patrick's letter of July 5th, nor his subsequent telegram of withdrawal (Rec., pp. 239-40, 262-3), and that Bowman confirmed his telegraphic acceptance of July 13th, Patrick determined to refrain from the course he had threatened in his letter of July 5th, and to abide by his offer accepted by Bowman (Rec. pp. 332, 350). Bowman having expressed, in his letter of July 16th, his willingness to sign such papers as Patrick might wish, *to evidence* the agreement concluded, Patrick forwarded a draft of contract (Rec. p. 294) signed by himself, from Leadville, on the 2nd day of August, enclosed in the following letter, addressed to Bowman, at Bayfield, Wisconsin (Rec. p. 516):

"Leadville, Colo., Aug. 2, 1882.

"Mr. F. J. Bowman, Dear Sir: Yours of the 16th ult. received. In accordance with your request therein, I send the within paper for your signature. I sold the note in St. Louis before getting your reply, so will have to wait until it matures, which will be September 19th. Yours truly, W. F. Patrick."

August 28th, Bowman, at his camp in the woods of

Wisconsin, replied to Patrick's last letter as follows (Rec. p. 226), inclosing the instrument recited in record p. 338–9.

"Camp near Brule River, Aug. 28th, 1882.

"Mr. William Patrick, Dear Sir: *I send you the contract you desire*, and trust this will *settle* our matters pleasantly and amicably. I have inserted a clause concerning your brother's interest, but he may not care to retain it. My address will be St. Paul until September 10; then I shall return to St. Louis and business. Yours truly, Frank J. Bowman. P. S. Mails are slow here."

Patrick left Leadville, August 30th, and went, by way of St. Louis, to Knoxville, Tenn., where Bowman's letter of August 28th reached him on September 7th (Rec. p. 339). September 2nd, en route, Patrick, at St. Louis, wrote to Bowman, at St. Paul, as follows (Rec. p. 240):

"I sent you from Leadville an agreement concerning the Col. Sellers, in which I agreed to pay that note, $288.70, and you relinquish all rights under the agreement. The shaft is still going down. The note will be due about September 19th, so please sign agreement, if you have not already done so, and send to me as soon as possible so that I may arrange to take up the note. My address for two or three weeks will be Knoxville, Tennessee. Yours truly, W. F. Patrick."

The statement in this letter that "the shaft is still going down" was not correct. Patrick explains his mistake thus (Rec. p. 350):

"At that time, I *believed* it was going down, and I learned afterwards that they had so much water that they were not doing anything in the shaft."

(See also testimony of these witnesses: J. C. Whiting, pp. 70–72, 89; A. J. Gerhard, p. 148; John D. Drummond, pp. 481–2; Alfred H. Boyd, p. 489; T. C. Stebbins, p. 533–4; John Livezey, p. 543.)

September 16th, Patrick paid Bowman's note, amounting with interest to $294.64 (Rec. pp. 334–5). The next communication between Patrick and Bowman was on October 19th, at Bowman's office, in St. Louis, at which time a deed was requested from Bowman of his interest in the Col. Sellers property, pursuant to the agreement of July 16th. It is impossible to reconcile what Bowman says about this interview with what is testified to by both William F. and James M. Patrick.

Bowman's account is that the interview was between himself and James M. Patrick only, and that William F. Patrick was not present; that James came to Bowman's office, on or about October 19th, to get Bowman's deed; that Bowman questioned James closely about the shaft, saying to him in substance, "There is nothing in this but what is all right? You haven't found anything there?" that, in re-

ply, James said, "Oh, no; Will is taking his chances on that;" that James said it would still take about $9,000 to go down far enough to know whether the property was worth anything or not; that James pretended to be acting for his brother William in obtaining the deed from Bowman; that James carefully refrained from intimating that there had been any discovery of ore; that he represented that nothing had been discovered; that Bowman asked about these things, and received these answers, before making his deed, and that he relied on these statements, and would not have made the deed had he know that, prior to that time, ore had been discovered. Bowman said that the consideration received for his deed was about what James Patrick represented to him to be the value then of Bowman's share of the old machinery about the mine; that James M. Patrick delivered to Bowman his note for $288.70, and received Bowman's deed to William F. Patrick (Rec. pp. 158–164).

It does not appear, however, from the testimony of Bowman, William F. or James M. Patrick, parties to this interview, that Bowman made any inquiry as to the expenses that had been incurred for sinking the shaft, or his proportion of it, or that he showed any consideration for the heavy burdens that Patrick had been bearing exclusively up to that time.

The account given of this interview by both William F. and James M. Patrick is entirely different from that by Bowman. These defendants testified that they went together to Bowman's office on the 19th of October, 1882; that James took no part in the conversation or transaction, except to request that the one-third of Bowman's interest coming to him should be conveyed to his brother William F. Patrick; that William F. Patrick presented Bowman's note; said he had paid it, and requested Bowman's deed; that Bowman promised the deed, and, the next day, October 20th, acknowledged and delivered it to William F. Patrick in person. Both deny that Bowman asked the questions he claimed to have asked about the work or developments in the shaft, or received the answers Bowman claims, in his testimony, to have received, or any such answers or statements in substance; and both deny that any inquiry was made by Bowman, or any statements made to him, about

the condition or developments in the shaft (Rec. pp. 339, 414, 416). That William F. Patrick was in St. Louis on October 19th, is shown by the testimony of the witness, Eliot C. Jewett, who is enabled to fix the date by the fact that he was married on that day, and that William F. Patrick attended the wedding (Rec. p. 511).

October 15th, 1886, four years after the time when Bowman delivered his deed to Patrick, this suit was brought. The facts stated in the plaintiff's bill, as his ground for relief, were that, prior to October 19, 1882, about August 1, 1882, the shaft in question had been so developed as to reveal to Patrick a large body of valuable ore, and to fully discover and establish the value of the mine, but that Patrick concealed the discovery, and stated and represented to the plaintiff that no mineral had been discovered, and that a large sum of money would still be necessary to prosecute the discovery of any valuable mineral (at what time or place, this concealment and these statements were made, the bill does not set forth); that Patrick procured the plaintiff's deed by means of such concealment and false representations; that plaintiff's deed was given for "a mere nominal consideration of $600;" that a knowledge of the fraud and deceit so practiced, came to complainant's knowledge within three months before the filing of his bill. As to when, where or how this knowledge came to plaintiff, and why not sooner, the bill is silent. The prayer of the bill is that the deed and transfer made by Bowman to Patrick be set aside, and that defendant be required to account for profits. The bill concludes with a prayer for general relief.

It is not stated in the bill, nor shown by the evidence, that the complainant has ever offered to restore the consideration he received for his deed, neither does the bill make any tender of restitution.

March 9th, 1889, judgment was rendered, dismissing the bill as against James M. Patrick, rescinding the sale to William F. Patrick, requiring a re-conveyance to Bowman, by the latter defendant of an undivided five forty-eighths' interest in this mining property, and for the recovery by complainant from William F. Patrick of dividends paid him on said interest, aggregating $57,099.69, and vesting the subsequent earnings of said interest in a receiver pending final

determination of the action; from which judgment, defendant William F. Patrick has appealed.

The foregoing pages embrace all the material facts that relate to the inception of the relations between the plaintiff and defendant, William F. Patrick, the correspondence, communications and transactions between them, during the existence of the same, and their termination.

The following is an abstract of the evidence showing the beginning of the work upon the shaft; the progress of that work; the developments and indications in the shaft from time to time; the significance of these developments and indications, as measured by the opinion of experts, and the acts and conduct of persons interested in the mine and cognizant of the facts.

March 18th, 1882, work was begun by Drummond the contractor (Rec. pp. 305, 479).

April 1st, the shaft was less than 25 feet deep (Rec. p. 259).

April 13th, the shaft was nearly 50 feet deep (Rec. p. 260).

May 15th, the shaft was 100 feet deep, and was blown up and seriously damaged (Rec. pp. 261, 306, 317, 480). Work on the shaft was then suspended for one week (Rec. p. 480).

June 19th, the shaft was 140 feet deep.

July 5th, the shaft was 165 feet deep and "looking very promising; the porphyry was heavily iron stained; the shaft appeared to be not far from the contact" (Rec. pp. 325, 250). It had cost at least $4,000. Bowman owed for outlays, then already made by Patrick, besides his note of $288.70, the further sum of $952.32 (Rec. pp. 327-8).

July 21st, no mineral had been found (Rec. pp. 447, 488). About this time, Patrick offered to let Colonel Bissell have the interest acquired from Bowman on the same terms Bowman had parted with it (Rec. p. 349).

July 31st, the shaft was about 215 feet deep, and looking "very encouraging" (Rec. p. 285). No mineral had yet been found (Rec. pp. 68, 88, 90, 368, 380-1, 447).

August 2nd, the shaft was still in porphyry, and no

mineral had been discovered (Rec. pp. 68, 88, 90, 346, 399, 488).

August 8th, no mineral had been struck (Rec. p. 399).

August 10th, no mineral or streak of mineral had been found (Rec. p. 459).

August 13th–14th, the shaft was between 230 and 235 feet deep, when a streak or stringer or gash of iron pyrites was first discovered (Rec. pp. 68, 88, 346, 447, 450, 480, 488, 532), with block porphyry solidly enclosing it, and extending twenty-five or thirty feet below, as was afterwards found (Rec. p. 481). This was the very first mineral or indication of mineral discovered in the shaft (Rec. pp. 68, 90, 368). The contents of this stringer were of no value, not even as an indication. They were assayed and found to carry nothing of value, not even a trace of value (Rec. p. 69, 88).

Angust 16th, the shaft was 240 feet deep (Rec. 405). Patrick at this time offered to Whiting the five forty-eighths' interest in the mine, acquired by him from Bowman, at just what it cost in assessments, which Patrick then stated to Whiting was about $2,300, but Whiting declined the offer (Rec. p. 86). About this time, Whiting exercised an option he held from Stebbins to purchase three sixty-fourths' interest of the mine for $1,500. As this interest had belonged to one of the original owners of the property, it was not chargeable with any part of the expense of sinking the shaft.

August 16th, Patrick entered into a new contract with the owners of the property, by way of compromise, by which he was required to sink the shaft to the depth of 250 feet before he should receive his deed, then in escrow, and, thereafter, all persons interested in the mine were to bear burdens and receive benefits in proportion to their respective interests (Rec. p. 405).

August 20th, at a depth of from 245 to 250 feet, the streak of iron pyrites disappeared from the shaft, and left it in solid porphyry (Rec. pp. 448, 535).

August 22nd, the shaft was 250 feet deep (Rec. p. 380).

August 30th, at a depth of 265 feet, a body of sulphide ore was struck, and water came into the shaft in such quantities as to stop work. The water rose to a height of twelve feet in the shaft, and could not be reduced, though worked

at day and night, from August 30th to the 1st of March following. During all that time, the bottom of the shaft was inaccessible (Rec. pp. 348, 481–2, 489, 532–3, 543).

October 19th, the shaft was from 265 to 267 feet deep, and in the same condition practically as on August 30th. All efforts, made day and night, to reduce the water in the shaft had been unavailing (Rec. pp. 348, 481–2, 489, 532–3, 543).

Between June 19th and October 19th, Patrick had expended individually in sinking the shaft $6,684.50, and was bound to pay, and did afterwards pay, $1,011.45 more, making a total of $7,695.95 (Rec. p. 345), of which three-sevenths, or $3,298.26, was chargeable to the share or interest acquired from Bowman. Before any ore was shipped from the mine, more than $20,000 was spent upon it (Rec. p. 345), which would make the total charges against the share acquired from Bowman, more than $5,000, before any ore was shipped. As late as February, 1883, interests in the mine were sold at exactly what they cost in the preceding July, together with expenses thereafter incurred (Rec. p. 150–1).

As to the importance and significance of the developments in the shaft, prior to October 19th, the testimony of the experts—which is directed mainly to the streak or gash or stringer of iron pyrites, as it is variously called by the witnesses, which was encountered on August 13th or 14th—is as follows:

Lyman Robison (Rec. p. 443), testified that he was one of the persons who located the Accident and Col. Sellers claims (Rec. p. 443); from the time work on the shaft was begun, he was present at the shaft constantly, except that sometimes he might skip a day or two; was there constantly during the month of July, 1882 (Rec. p. 447); the first mineral seen by him in the shaft was a little stringer on August 14th or 15th; "it was pyrites of iron; just a little gash in the porphyry; it was started in from, say a knife-blade, to, may be, two or two and one-half inches; then it went down the shaft, then the shaft went right into porphyry; * * * we considered it as nominally nothing, and it came in so thin, and pitched out so quick, we did not regard it as anything" (Rec. p. 447–8); August 15th or 16th, he went down into the shaft with his attorney, and, on the

way down, met William F. Patrick, who stated to witness' attorney that the thing was far from encouraging; the shaft was continued straight down and did not follow this stringer; that he was watching the property very closely at that time, to be sure of finding mineral before the jumpers should find it (Rec. p. 449); had long experience in mining; was familiar with the formation in and about Leadville and on Iron Hill, where the Sellers shaft is; the occurrence of seams or stringers of iron pyrites in the porphyry on Iron Hill is very common; they are called "gash;" the occurrence of such stringers is hardly an indication of the near presence of a body of mineral; it would not be taken by a miner of experience as adding one penny to the value of a mining property; did not regard the occurrence of this stringer as amounting to anything; this stringer occurred at a depth of about 234 feet (Rec. pp. 449–50); at that time, he refused to concede the fact that the finding of this stringer was a finding of pay mineral, and William F. Patrick assented (Rec. p. 450); the rock in which work was then going on in the shaft was intensely hard (Rec. p. 455); was sure that the stringer or gash pitched out of the shaft, and left it in solid porphyry, and pitched out abruptly; would have been only too glad if mineral had been found (Rec. p. 457); had seen a shaft near Leadville, and had seen iron stains a few feet from the surface, had then sunk down 125 feet and found nothing; the occurrence of iron stains in porphyry was no indication of mineral; had mined too much for that; it was no indication; water would make a stain in porphyry (Rec. p. 458); it was not true that, on July 30th, some stringers of ore had been already cut in the Col. Sellers shaft, or that one of them assayed nineteen ounces in silver; was on the ground, on July 30th, and knew what he was talking about; it was not true that a streak or mineral vein was cut into in that shaft a distance of four feet, prior to August 11th, as was assumed in the question put to the witness; was positive about that (Rec. p. 459); recollected that mineral was struck at the depth of 265 feet; Patrick never had an ounce of mineral, never had a streak, and never had anything until he struck this gash vein on the 14th or 15th of August; was positive about that (Rec. p. 461).

O. H. Harker testified that his occupation had been mining for twenty-seven years in Colorado and Nevada, mainly in Colorado, and about eight years in the vicinity of Leadville; had held positions known as "mine manager," superintendent of mines, and had had charge of a number of mining properties; these mines were on Carbonate, Iron, Fryer and Breece Hills, in the immediate vicinity of Leadville; was acquainted with the formation of Iron Hill, in the vicinity of Col. Sellers mine; had had experience in sinking shafts in the vicinity of these mines; the occurrence of seams or stringers of iron pyrites was frequent in porphyry; it was true of the Leadville camp generally; such stringers were found almost everywhere when the porphyry is penetrated, and at varying depths; the iron pyrites was frequently found in the rock, without the rock being decomposed; as a mining man, he did not attach any significance whatever to a seam in the porphyry containing mineral or pyrites of iron and matters of that kind, because it was a frequent occurrence, at varying depths in the porphyry; from near the surface down, 500 feet deep, these seams occurred in varying depths all the way in that 500 feet; spoke from his own observation; it did not indicate the approach of a vein or contact; the occurrence of such seams added no value whatever to the property, because such mineral was in itself as valueless as the porphyry which encloses it; about Leadville, no value was attached to anything of that kind; he attached no importance whatever to the occurrence, in the Col. Sellers shaft, at a depth of 235 or 240 feet, of a stringer or seam of iron pyrites, varying from half an inch to two and a half inches in thickness; never yet had seen a seam of iron pyrites that connected with a proper vein of ore; such an event added nothing to the intrinsic value of the property in which it occurred (Rec. pp. 470–2); regarded heavy iron stains in the porphyry as an encouraging circumstance (Rec. p. 478).

J. C. Whiting testified that he took samples from this vein or streak, and had them assayed, but he could not get a trace of value (Rec. pp. 69, 88). Even the ore which was discovered on the 30th of August proved to be of no value at that time, owing to the cost of reduction (Rec. pp. 89, 465–6).

Frank G. White, a miner of thirty-four years' experience, and who had managed several mines immediately adjacent to the Col. Sellers, testified (Rec. pp. 461–4) that he was familiar with the formation there and in the Col. Sellers mine; the occurrence of stringers of iron pyrites or small seams of mineral in the porphyry was frequent, but did not lead to mineral more than once in a hundred times; there is no real value in such an occurrence, he knew quite a number of instances in that locality in which streaks of iron pyrites occurred in the shafts, and where no mineral was ever found.

T. C. Stebbins testified (Rec. pp. 533–5) that he had had about six years' experience as a miner, particularly at Leadville; seams of iron pyrites were very common in the porphyry on Iron Hill; had seen iron pyrites impregnated in blocks of porphyry; iron pyrites was not of any value as a general thing; did not know whether the seams of iron pyrites led to the main ore bodies or not, because he never followed one of them; thought that streaks of iron pyrites *bearing silver,* with a decomposed condition of the porphyry, were evidence of mineral to some extent; did not know just where the mineral was; it was some indication; was not a certain indication, but a sub-indication; had seen a great many of these fissures that had not demonstrated anything of value.

The testimony shows, further, that Bowman never paid one dollar of capital into the enterprise. The only thing he ever did in that direction was that, when called upon to contribute his share of the capital, he demanded and received a credit as against Patrick for some $264.25, and gave his note for $288.69, which he never paid. Immediately upon giving his note for $288.69, he received from James M. Patrick, and afterwards collected in full, with interest, a note for $245.75. The difference between the sum for which Bowman thus took credit against Patrick, and the principal of the note he received at the same time and afterwards collected from James M. Patrick, was $18.50; so that $18.50 REPRESENTS, AT THE UTMOST, BOWMAN'S INVESTMENT IN THIS ENTERPRISE (Rec. pp. 311–2, 359, 319, 335, 410–11).

In June, 1883, seven or eight months after Bowman had abandoned all connection with the mine, and had been re-

leased from all liability in respect to it, and after more than $20,000 had been expended upon it by others, the mine began to be profitable, and, in the course of two or three years, became of great value.

ASSIGNMENT OF ERRORS.

Appellant assigns for argument, as error, the following matters:

I.

The Court erred in not dismissing the bill of complainant on the *ground of laches*, in that he neglected to file the same until four years after his cause of action is alleged to have accrued, the evidence disclosing that he had many opportunities for acquiring full knowledge, a long time prior to the filing of said bill, of the fraud complained of.

II.

The Court erred in finding that *no valid, binding agreement* had been concluded between complainant and appellant, for the *dissolution of their contract relations*, prior to August 30th, 1882, the date on which mineral was first discovered on the mining property wherein they had theretofore claimed a joint interest.

III.

The Court erred in finding that the *default of complainant* in the discharge of his obligations as a partner of appellant *had not exonerated* the latter from the duty of disclosing the discovery of mineral when found, and that the *complainant was not estopped* from claiming any rights whatsoever as a partner.

IV.

The Court erred in not dismissing the bill because of *complainant's failure to prove* that, prior to October 19, 1882, "the mines had been so developed as to reveal to appellant a large body of valuable ore, and to fully reveal and establish" their value.

V.

The Court erred in not dismissing the bill of complainant on the ground that he had received an *adequate consideration* for the sale of his interest in their enterprise to appellant.

VI.

The Court erred in finding that a *partnership existed* between complainant and appellant under and by virtue of their contract for the purchase of an interest in these mining claims.

VII.

The judgment of the Court is contrary to the law and the evidence.

ARGUMENT.

I.

Complainant's Laches.

The defendant submits that complainant has not shown himself entitled to relief in a court of equity, because the contract which he seeks to rescind was made long prior to the commencement of this suit.

Complainant's insinuating and reckless statements, his attempt to inject an argument into every answer, his counsel's false construction of every incident, would seem, without a careful examination of the record, to cast some color of wrong upon the defendant, which is necessary to refute; but we deem the task one rather of careful sifting of evidence than of combating charges having apparently substantial basis in fact. In consideration of the evidence, and of the law applicable thereto, we maintain that, upon undisputed facts, the complainant is not entitled to relief, in that his claim is made too late for consideration, and comes after such changes in the condition of the subject-matter of litigation as to render it impossible, even under the most favorable construction of the complainant's case, to re-instate him in his former position.

The complainant's claim is stale. Four years elapsed

from the time the complainant made his deed, up to the time when he brought this bill to set it aside, asking the Court to give him a one-fourth part of the Col. Sellers and Accident Mines, and one-fourth of its past earnings. Four years prior to the commencement of this suit, the complainant parted with an expensive prospect of no certain value, and was glad to escape from the risk and liability of a doubtful venture. Now he asks to be put into the enjoyment of a valuable property and its increment.

At best, a mine is liable to sudden and great changes of value; often it involves a very large expenditure of money, and great risk of capital, a waste of time and labor, and exposes the owners to the peril of absolute and irretrievable bankruptcy. It may be profitable to-day—worthless to-morrow, or *vice versa*. As to a mere prospect, or the right to land on which to search for ore or mineral, it may be said that such property has no positive value. Its worth is altogether speculative and uncertain; it may result in success and profit—or, in total failure and actual loss to all persons engaged in it.

One who seeks to rescind a contract he has made must be prompt in making his demand, and in applying to the Court, if necessary. This is true in ordinary cases, where the subject matter of the contract is of stable value, not subject to great or sudden changes. Even in such cases, one can not lie by and neglect his rights, or his opportunities of discovery, and thus exercise a continuing election to affirm or disaffirm, as circumstances may determine. If this is true in ordinary cases, much more is it so where the subject-matter of the contract, at the time, is of no absolute value, but is entirely dependent upon the uncertainties of the future.

In such cases, he who wishes to rescind must act with the greatest diligence and promptness, or abide by his contract. After the future has developed great value, he can not be heard to repudiate his agreement, except upon the fullest showing of the greatest diligence in ascertaining and asserting his rights. If there has been delay, he must allege and prove the facts which have hindered him despite his vigilance.

"A general allegation of ignorance at one time and knowledge at another is of no effect. If the complainant made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. There must be reasonable diligence, *and the means of knowledge is the same in effect as knowledge itself.*"

101 U. S. 135, Wood v. Carpenter;
17 Wall. 78, Harwood v. Railroad Co;
15 Fed. R. 53, Credit Co. v. Railroad Co;
91 U. S. 587, Twin Lick Oil Co. v. Marbury;
94 U. S. 806, Sullivan v. R. R. Co;
101 U. S. 567, National Bank v. Carpenter;
115 U. S. 96, Wollensak v. Reiher;
2 Wall. 87, Badger v. Badger;
106 U. S. 391, Landsdale v. Smith;
1 Kay & J. 480, Powell v. Clayton;
1 Younge & C. Ch. 98, Prendergast v. Turton;
5 Cal. 159, Pipe v. Smith.

In this case, nothing is alleged or proved to excuse the complainant's delay in bringing this suit. In his bill, he states that he did not discover the facts alleged until within three months of the time of its filing, but he neither alleges nor proves that there was any obstruction to his learning all the facts earlier, or at any time during his long period of inertia; nor that he made any effort whatever to learn the matters which he now pleads for the rescission of his contract.

Complainant alleges that, about August 1, 1882, a large body of valuable ore was discovered in the Col. Sellers shaft; that appellant concealed this discovery, and falsely represented to the complainant that no mineral of value had been found, and that a large sum of money would be necessary to prosecute further discovery. Bowman *knew* what representations Patrick had made. Therefore, the only fact Bowman had to learn, to acquaint him with his rights, was the discovery of valuable ore about August 1st, or, at least, before he contracted to sell his interest. That he *did learn* the *great value of the mine, long prior* to the filing of his bill, *is proved by three witnesses.*

William H. Wilson testifies (Rec. pp. 527–8):

"I had a conversation with the plaintiff, Frank J. Bowman, at his office, in St. Louis, in October, 1885; I called to see if Bowman did not want to go into some mining-properties' operations, and presented one to him, and, in the course of conversation, I suggested to him that he had done me a very great injury in not holding on to his interest in the Sellers, and asked him if he did not feel like

having himself kicked for giving up his interest. He said, No, *he was not a man to cry over spilt milk.* He was in a big scheme with Tallmadge and others down in Texas, and he thought he would come out all right; that he was very glad Patrick had made a success of it. He had always treated him nicely, and *he had nobody to blame except himself.* He gave as an excuse that he was in some railroad speculation, through the state, and he had lost a great deal of money on it, and was not able to carry his assessment on these operations he had gone into. *I told him* that had he have carried his interest in that, and complied with his verbal contract with me, that I should have been getting twenty-five hundred or two thousand dollars a month instead of Livesay getting it, and he *would have been getting seven or eight thousand a month* instead of the other parties who had interests in it. *I also censured him, and went on to explain to him* the developments of the camp, and what the output would be, and how much money he would have made if he had stuck to his agreement. He said to that he had lost money having been in this railroad, and, because he had lost the money, was not able to carry the assessments. I told him about this man Livesay having a little pawn-broker's shop, and being broke, and then getting twenty-two to twenty-five hundred dollars a month."

William Patrick, father of the appellant, testifies (Rec. p. 134–5):

"I had a conversation with the plaintiff in this case, Mr. Frank J. Bowman, at the northeast corner of Pine and Sixth Streets, St. Louis, in June or July, 1885; he stopped me on the curbstone and shook hands with me, and he said 'Well, your boys are making some money out of that mine;' and I said, 'Yes, I believe they are;' 'Well,' he said, 'I ought to have held on to that mine, but I could not do it, I hadn't the wherewith to do so;' and he says, 'I am very glad they are making some;' we met several times before that, and he would make about those same remarks."

James M. Patrick, co-defendant below, testifies (Rec. p. 417):

"I had a conversation with Mr. Bowman about Christmas, 1882, or in January or February, 1883; I told him things were looking more favorable out there at the mine, and I was sorry, for his sake, that he sold out, and was glad on behalf of my brother that he had done so, and he expressed himself as more than satisfied with the *agreement—with the status of affairs;* that he had not been able to pay his assessments, and that, even if he had, the *constant fear of litigation and jumpers would have caused him to sell out,* and for me to express his congratulations to my brother when I saw him; I wrote him; during 1883, 1884 and 1885, and I think, in 1886, he spoke the same way; I had a number of conversations with Mr. Bowman about the improved prospects of the property, and he always expressed himself as more than satisfied with the deal and the manner in which he had been treated."

To a man of ordinary shrewdness, much less to one of the rare acumen exhibited and undoubtedly possessed by the complainant (see his testimony), his certain knowledge, positively testified to by these witnesses, would have been sufficient to suggest inquiry as to the date of the first discovery of valuable ore. That he had ample opportunities to acquire full information of the fraudulent deception that he pretends was practiced upon him, appears from his proximity to the witnesses Gerhard and Whiting, who resided in the same city with complainant, and to his former co-owners, Samuel J. Glover, who resided in Chicago, and Harvey Howard, who resided in Ohio.

But he ignored these clues and hints during four years, and waited craftily until the future had brought forth its issue — waited until others had expended large sums of money, and, with much labor, anxiety, sacrifice of securities, and incurring of heavy liabilities, had developed the, to him, worthless prospect, into a mine of known value. Having thus slept on his pretended rights, it is now too late "to cry fraud," and claim a share in the harvest created by the risk, capital, labor and pluck of others.

"The doctrine is well settled that the option of avoiding such a sale must be exercised within a reasonable time. This has never been held to be any determined number of days or years, as applied to every case like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question. These are, generally, the presence or absence of the parties at the place of the transaction; their knowledge or ignorance of the same, and of the facts which render it voidable; the permanence or fluctuating character of the subject matter of the transaction as affecting its value, and the actual rise or fall of the property in value during the period within which this option might have been exercised. * * * In this class of cases, the party is bound to act with reasonable diligence as soon as the fraud is discovered, or his right to rescind is gone. *No delay, for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain or rescind it, is allowed in a Court of equity.* * * * The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands to-day is worth nothing to-morrow, and that which would to-day sell for a $1,000, as its fair value, may, by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time, be made to yield that much every day. The injustice, therefore, is obvious in permitting one holding the right to assert an ownership in such property to voluntarily await the outcome, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit."

91 U. S. 587, Twin-Lick Oil Co. v. Marbury;
96 U. S. 611, Hayward v. National Bank;
8 DeG. M. & G. 787, Clegg v. Edmonson;
39 Me. 404, Rouse v. Southard;
65 Me. 566, Penobscot, etc. Co. v. May.

As bearing upon the question of knowledge, and the means of knowledge, which Bowman had of the facts which would have put him upon inquiry, and which, if diligently followed up, would have led to a discovery of the fraud that he now asserts against appellant, we call the attention of the Court to the terms and conditions of the contract of February 17, 1882, which fixes the rights and liabilities of these litigants. The contract recites that, simultaneously with its execution, a deed of conveyance, for an undivided one-half of said property, was executed by the then claimants of the Col. Sellers and Accident mines, to Patrick and Bowman, which

was deposited in escrow, "*to be delivered* to the parties of the second part *when they shall have sunk a good and substantial shaft in and upon said premises to limestone in place or bedrock, unless pay mineral is found in said shaft before reaching the limestone in place or bedrock.*" So that, by the terms of the very contract which is the inception of the relations between Bowman and Patrick, they would not be entitled to their deed until the contract had been fully performed.

What would constitute a full performance which would entitle Patrick and Bowman to a deed for one-half interest in the property? The answer to this question is, "Not until they had sunk their shaft either to limestone in place or had reached pay mineral therein." Until the happening of one of these contingencies, they could not claim delivery of the deed which, until then, must rest in escrow. Neither Patrick nor Bowman would be in position to convey their interest in the property, or to receive a deed therefor. Bowman knew the contents of this contract as well as Patrick. He testifies that he drew the original draft of the contract; that he settled its terms; that he signed the contract himself; that he was thoroughly familiar with all its provisions. He was a lawyer—keen, sharp, shrewd—as is evidenced by his adroit answers and arguments when giving his testimony. No one was better able to construe and understand the terms and conditions of that contract than was Bowman.

The presentation, October 19, 1882, to Bowman of a deed conveying his remaining interest in the Col.Sellers and Accident mines to W. F. Patrick, was notice to complainant that appellant had completed the contract made by them with the owners of the mines, because, if it had not been performed, Bowman would have been in no condition, nor would he have had a right, to convey any interest in the property to Patrick or to any one. All that he could have done, at this time, if pay mineral had not been reached, or the shaft sunk to limestone in place, would have been to assign his interest in the contract to Patrick, as he had previously assigned interests to Wilson and James M. Patrick.

When a deed was demanded by Patrick from Bowman, he might well have said, "Why is it that you demand a deed, instead of an assignment of the contract? Has it been performed? Have we struck pay mineral, or has the shaft

reached limestone in place or bedrock?" In his cross-examination, Bowman was asked this question (X. Q. 507), "Why did you execute a deed at that time?" He answered, "Because I owned the property" (Rec. p. 235). And again, in answer to cross-question 92 (Rec. p. 177) Bowman said: "*My understanding* is that we entered into a contract by which we were to sink a shaft for the discovery of mineral on certain terms, and to receive *our title when the mineral was found.*"

This would show that he knew their contract had been performed; that he and Patrick were entitled to their deed; and that the complainant could convey the property *by deed.* The notice, thus given him by the request for the execution of a deed, was that either pay mineral or limestone in place had been reached. This notice, followed up by the simplest inquiry upon his part, would have enabled him to determine the exact time when mineral was found, the value and extent of the discovery, and all other facts needed to determine whether or not he had been imposed upon by Patrick, or if fraud had been practiced.

Upon this proposition, we cite the case of *Feall v. Slavin*, 40 Fed. R. 777, in which Judge Sawyer uses the following language:

"The means of knowledge are equivalent to knowledge, *a clew to the facts*—which, when followed up diligently, would lead to a discovery—is, in law, equivalent to knowledge." * * * "It will be observed that there is no averment that, during the long period over which the transactions referred to extended, the plaintiff ever made, or caused to be made, the slightest inquiry. * * * Proper diligence could not have failed to find *a clew* that would have led to evidence not to be resisted. *With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort.*"

The allegation of non-knowledge in that case is substantially that made by this complainant.

"Whatever is notice enough to excite attention, and to put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a *fact*, he shall be deemed conversant of it." "The presumption is that if the party affected by any fraudulent transaction or arrangement might with ordinary care and attention have seasonably detected it, he seasonably had actual knowledge of it."

3 Myl. & K. 722, Kennedy v. Greene;
Ang. Lim. § 187, and note.

"A party seeking to avoid the bar of the statute on the ground of fraud must aver and show that he used due diligence to detect it, and, if he had means of discovery in his power, he will be held to have known it." "Concealment by mere silence is not enough. There must be some direct deed or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable dili-

gence, and the means of knowledge are the *same*, in effect, as knowledge itself. Possession of such means of knowledge is in equity the same as knowledge itself."

28 Miss. 432, 434, Buckner v. Calcote;
8 Allen 130, Nudd v. Hamblin;
11 Wall. 187, New Albany v. Burke.

Complaint avers that he had not the same means of knowledge that appellant had, because the latter resided in Leadville, while the former resided in St. Louis.

Says Mr. Justice Bradley, in *Broderick's Will Case*, 21 Wall. 519:

"Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitudes to which they are subject."

Judge Sawyer, in the *San Jacinto Tin Case*, 9 Fed. R. 726, adds:

"It must not be forgotten not only that the world 'moves on,' but in this age and country, and, in this part of the country, it moves rapidly. Three years now, and especially in California, is longer in events and progress than twenty years some centuries ago, when the statutes of limitation were adopted in England. Parties can not lie down to sleep on their rights, and on waking up many years afterward, find them in the same condition in which they were left."

"Courts of equity, acting on their own inherent doctrine of discouraging for the peace of society antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*. Relief in such cases may be sought, but the rule is that the *cestui que trust* should set forth in the bill, specifically, what were the impediments to an earlier prosecution of the claim, and how he or she came to be so long ignorant of their alleged rights, and the means used by the respondent to keep him or her in ignorance, and how he or she first came to a knowledge of their rights."

99 U. S. 211, Godden v. Kimmel;
2 Wall. 87, Badger v. Badger;
1 Knapp 227, White v. Parnther.

"When a party appeals to the conscience of the Chancellor in support of a claim," says Mr. Justice Field, *Marsh v. Whitmore*, 21 Wall. 185, "where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse right, he should set forth in his bill specifically what were the impediments to an earlier prosecution of the claim, otherwise the Chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer or any formal plea of the statute of limitations contained in the answer."

As to all these essentials, the complainant's bill and proofs are alike fatally defective.

II.

Sale and Dissolution.

Says Judge Brewer (Rec. p. 47): "The obligation of

full disclosure remained until there was some binding contract between the parties." Without conceding unqualifiedly this doctrine as applied to the equities arising herein, we urge the complete satisfaction of the condition.

Such a contract was concluded long prior to any discoveries entailing the duty of disclosure. It had all the necessary elements—offer, acceptance, mutuality, consideration, certainty. As to *substance and effect*, devoid of formal legal phrase, the minds of the parties *met*, on July 16th. Then and thereby, *each understood and agreed* that *Bowman had parted* absolutely with *all his interest* in their joint contract for the purchase of a portion of these mining claims.

OFFER. June 22nd, Patrick wrote, *inter alia*, as follows (Rec. p. 262):

"In regard to your interest in the Col. Sellers, I think I know a man who will pay the note you gave me, $288.69, and take your interest off your hands, and let me go right ahead with the work, which I would very much like to do. If you are willing to let it go on these terms, which is the same proposition you made me in your office, please telegraph me immediately, and I will try to make the arrangement."

June 27th, he wrote, *inter alia*, as follows (Rec. p. 276):

"I would also like to have an answer in regard to the proposition I made you about the Col. Sellers, to return you your note, and forfeit your share in the contract. There is a party here who will take it."

June 28th, he wrote, *inter alia*, as follows, (Rec. p. 293):

"Please let me know what we are to do in this new complication, and also about the Col. Sellers, as I am anxious to continue work on that property and see what is there."

From these letters, it appears that Patrick *promised* to cause the payment and return, to Bowman, of his note, and, in effect, to release him from all further liability for expenses incurred and to be incurred in the prosecution of their joint enterprise, in *consideration* that Bowman should *transfer his share* in their contract to Patrick himself or to some party by him to be named.

ACCEPTANCE. There was some slight delay in the delivery of these letters to plaintiff. All were directed to him, at St. Louis, Missouri, whence they were forwarded to and received by him; the first at Bayfield, Wisconsin, July 12th, the second and third at St. Paul, Minnesota, July 16th. But nowhere, in them, does it appear that there was any limitation of time within which there must be an acceptance, and in default whereof their offer would be withdrawn.

Bowman treated Patrick's proposal properly, and as, in reason and according to the authorities, he had a right to treat it, as "a continuing offer" until impliedly or expressly withdrawn.

"An offer not limited in its continuance remains open for acceptance a reasonable time." "It continues until it is expressly revoked, or until circumstances authorize a presumption that it is revoked."

5 Lawson's Rts. & Rem., § 2234;
9 How. 390, Tayloe v. Ins. Co.;
6 Wend. 106, Mactier v. Frith;
6 Iowa 279, Moore v. Pierson.

Patrick's first letter, of June 22nd, *requesting reply by telegraph*, reached Bowman "in the woods" (Plaintiff's brief, C. Ct., p. 11), remote from telegraph lines. He proceeded forthwith to Ashland, Wis., the nearest telegraph station, and, July 13th, *telegraphed* Patrick as follows (Rec. p. 329):

"Yours of June 22nd received yesterday. Proposition accepted. Send note."

The proposal so made and accepted was identical with that made by Bowman to Patrick, June 19th, at the office of the former in St. Louis, Mo. (Rec. p. 322, p. 239, Ans. 530). At that time, the subject matter and conditions had been discussed fully and were well understood.

While Patrick's first letter, to which alone this telegram was a reply, was not altogether decisive in its language, it was so supplemented by his second letter of June 27th, received by Bowman, at St. Paul, July 16th, that the *two letters conjointly presented clearly and unequivocally* the exact terms of the proposal theretofore made by Bowman to Patrick, and to which the former had re-assented, as he believed and intended, by his telegram.

Therefore, promptly upon receipt of these letters of June 27th and 28th, while Patrick's offer was yet continuing, to put his acceptance thereof beyond the peradventure of a doubt, and in confirmation of his telegram, Bowman wrote and posted, July 16th, a letter containing, *inter alia*, these sentences (Rec. p. 332):

"When I came out of the woods, I found your letter of June 22nd, waiting my answer, and I telegraphed you on the same day, accepting your proposition to surrender to you all my remaining interest in the property adjoining the A. Y., on your surrendering my note; and, on a perusal of your subsequent letters, received here at St. Paul, to-day, I learn that is

your wish; I do not complain of it. My judgment differs from yours as to the course to pursue, and I should not stand in your way and will not. If you wish any papers signed, send and I will sign them. My address is Bayfield, Wis."

If there could be any doubts of the binding force of the contract upon the dispatch of the telegram, all such must vanish with the *posting of this letter*. Then, the contract first suggested by Bowman, and re-proposed by Patrick, was firmly clinched and finally consummated. After its posting, neither party could rescind without the consent of the other.

5 Lawson's Rts. & Rem, § 2233;
1 Barn. & Ald. 681, Adams v. Lindsell;
1 H. of Lords 381, Dunlop v. Higgins;
9 How. 390, Tayloe v. Ins. Co.;
4 Page 16, Brisban v. Boyd;
6 Wend. 106, Mactier v. Frith;
11 N. Y. 441, Vassar v. Camp;
36 N. Y. 307, Trevor v. Wood;
4 Bush. 261, Calhoun v. Atchison;
4 Ga. 13, Levy v. Cohen;
7 Dana 281, Childs v. Nelson;
32 Md. 196, Stockham v. Stockham.

It is immaterial when, where, or if ever, acceptance reached the proponent.

Bishop on Contracts, § 328;
4 Ex. Div. 216, H'hold Ins. Co. v. Grant;
61 N. Y. 366, Howard v. Daly;
11 N. Y. 441, Vassar v. Camp;
42 Wis. 152, Washburn v. Fletcher.

NO REVOCATION. For two reasons, the Court below (Opinion, Rec. p. 46) held the non-existence of this contract, on July 16th:

(1). "The letters in June from defendant contained no proposition of his own, but simply communicate the *proposition of another party*."

(2). "According to defendant's testimony, and he cannot now be heard to deny it, he had *eight days before withdrawn* the proposition, and, two days after the telegram of July 13th, he *notifies* complainant that his *acceptance was too late*. Of course, he cannot now say that any contract was created by these communications. He himself had never made a proposition, and the party for whom he assumed to act had withdrawn the offer."

We submit that, as statements of fact, these objections are not founded upon the evidence. And we aver, with full

confidence, that the conclusions are ill-considered, and can be sustained neither upon principal nor by authority.

First. (*a*) In his first letter, Patrick says: "I think I know *a man* who will pay," etc.; "if you are willing * * * I will try to make the arrangement." In his second letter, he requests "an answer to the proposition *I made you* * * * to forfeit your share of the contract. There is a party who will take it."

He names no party; he avers no positive authority from a principal other than himself. His language is consistent clearly with an intention entirely proper to become himself the assignee in the first instance, of Bowman's share, either for his own benefit, or, ultimately, as he might elect, to reassign to a third party. Should Bowman accept the proposition and withdraw from their enterprise, he intended, as he well might, fairly and wisely, to control absolutely the choice of a new partner or any.

In his second letter, he treats the proposition as his own, the one "I made you." And so, likewise, was it regarded by Bowman, who, July 16th, wrote: "I telegraphed you accepting your proposition *to surrender to you;* I should not stand *in your way*, and *will not*."

Bowman treated the proposal as Patrick's own because, to him, it was utterly immaterial who, if any one, should acquire his interest. He was glad to escape from an unprofitable adventure, and to be released from some portion of liability previously incurred.

"He who seeks equity must do equity." Comes Bowman "with clean hands" into court? Having accepted this offer as of and from Patrick, and having encouraged him to believe in an entire willingness to permit him to bear alone the heat and burden and hazard of their enterprise, it does not *now* lie in Bowman's mouth to repudiate a construction he once deemed advantageous to himself. If deception has been practiced, the dupe has been Patrick, not Bowman.

(*b*) Again, conceding that Patrick intended that his proposal should be regarded by Bowman as that of an existing third party, none the less was the former bound thereby equally as if his own. Such principal was utterly unknown—to Bowman, undiscovered. Whether such principal be imaginary, or Patrick had exceeded his authority from,

or sufficient authority had been withdrawn by, a real principal, Bowman, having been induced to deal with him as an agent of a suppositious principal, and having relied upon his representations of an authorized agency, could have held Patrick as personally bound for the fulfillment of the contract, upon the discovery either of the non-existence of a principal, or of an exceeded authority—or of the withdrawal of authority *without notice* to Bowman *in advance of his acceptance.*

Here, as we have seen, Bowman undoubtedly intended to hold Patrick responsible in *propria persona*, and was entirely indifferent as to who, if any one, was principal in fact.

"One who acts as the agent of an undisclosed (or *sham*) principal may be treated as principal by the party with whom he deals." "By holding himself out as having competent authority, he thereby draws the other party into a reciprocal engagement, and he becomes personally responsible for the consequences."

Mechem on Agency, § 554, 557;
Story on Agency, § 264, 267;
123 Mass. 77, Welch v. Goodwin;
1 Dickens 289, (Eng) Molesworth v. Opie;
4 Ad. & E. (n. s.) 219, Harper v. Williams;
5 Dow. 157, Bayne v. Ferguson;
16 Fed. Rep. 646, Darlington Co. v. Foote;
5 Cush. 210, Winsor v. Griggs;
3 Allen 258, Merriam v. Wolcott;
7 Wend. 315, Meech v. Smith.

Second. It is not true that Patrick "had eight days before *withdrawn* the proposition." It is equally untrue that, "two days after the telegram of July 13th, he *notifies* complainant that his acceptance was too late."

By letter of July 5th (Rec. p. 324), and by telegram of July 15th (Rec. 239-40, 262-3), Patrick *attempted* undoubtedly to withdraw his offer, but his effort failed. His offer "continued" until Bowman personally received notice of the withdrawal, and there is no evidence that the letter was ever received. Contrarily, Bowman denied that he ever received (Rec. p. 240-4, 272) the letter or its enclosures.

The telegram was sent in duplicate, and was received by the telegraph offices on July 16th, one copy at St. Louis, Mo., and the other at Ashland, Wis. (Rec. pp. 239, 263). De-

livery to Bowman on that day was physically impossible, because he was then in St. Paul, Minn. (Rec. pp. 227, 332), whence he wrote his confirmatory letter of acceptance, *supra;* and it does not appear that either of the telegrams were repeated to him, at St. Paul, from the receiving offices at St. Louis and Ashland.

The record discloses *no evidence* of the slightest suggestion or intimation to Bowman *before* the dispatch of his letter of acceptance, July 16th, of an intention by Patrick to revoke his offer made in the letters of June 22nd and 27th. Revocation not having been communicated before acceptance, the attempted withdrawal by the letter of July 5th and telegram of July 15th was altogether *inoperative*. So say the authorities uniformly.

Benjamin on Sales, § 44;
1 Parsons on Contracts, page 483;
5 Lawson's Rts. & Rem. § 2,235-6;
9 How. 400, Tayloe v. Ins. Co.;
3 Eng. R. 529, (Moak's) Harris' Case;
95 E. C. L. 657, Baines v. Woodfall;
36 N. Y. 307, Trevor v. Wood;
11 N. Y. 441, Vassar v. Camp;
47 Ark. 519, Kempner v. Cohn;
31 Md. 99, Wheat v. Cross;
48 N. H. 14, Abbott v. Shepard.

After consummation of the contract, by posting the letter of acceptance, Patrick could not rescind it without the consent of Bowman. If, in fact, contrarily to his denials here of record, the latter *did* receive the former's letter of July 5th, communicating a revocation, he studiously concealed such receipt, and, by his own later letter of July 16th, caused Patrick to understand that Bowman refused to rescind, but, contrarily, was strenuously insistent upon performance.

Paraphrasing the language of the Court (Rec. p. 46), Bowman having stood stubbornly on the contract when he deemed himself the gainer thereby, shall he now be heard to give the lie to his own denials, and discredit the obligation, when he discovers himself overreached by his own short-sighted selfishness?

MUTUALITY. The obligation of this contract was fully

and equally reciprocal. The minds of both parties agreed, in the words of Judge Story, "to the same subject-matter in the same sense." The subject-matter was Bowman's interest in their enterprise. The terms were the release of Bowman from liability upon his note, and the surrender of his interest.

His acceptance of Patrick's proposition was unqualified. On the 16th of July, each party had stipulated, without limitation or further proviso upon the part of either, precisely to the same effect. Each understood and assented equally to his own and the other's obligation.

In his telegram of July 13th, Bowman declares "proposition accepted"—terse, clear, emphatic, sweeping. Then he adds, as an afterthought, "send note." But the words added are *not* a condition. He does not make acceptance dependent or contingent upon the possession of that bit of paper thereafter worthless as a token of the amount of his liability thereon. The *substance* of what he accepts from Patrick is the *promise* to cause the payment or cancellation of the note. He intends unreservedly, in that instant of time, by that declaration, to abandon absolutely all further claim, voice or interest in their former connection; and he requests return of note, merely that he be furnished with the *evidence* of performance by Patrick. That he attaches no vital importance to the recovery of the note, appears from his neglect to repeat the request in his letter of July 16th. Then, replying to Patrick's supplemental letter of June 27th, he corroborates fully and confirms finally his acceptance by telegraph.

Thereafter, the bargain was complete. Nothing more was necessary in the nature of explanation or assent upon the part of either. There remained only the performance of their respective obligations. That Bowman understands the legal effect thus, is manifest from his closing sentence, "*If you wish* any papers signed, send and I will sign them." In his own estimation, he implies, each is *then* to the other *firmly bound*, and the draughting of additional instruments is but idle superogation.

The subsequent letters, with enclosures, of August 2nd (Rec. p. 516) from Patrick to Bowman, of August 28th (Rec. p. 226) from Bowman to Patrick, and of September

2nd (Rec. p. 240) from Patrick to Bowman, only "rehearse and re-affirm their previous correspondence, and thereby" become a part thereof.

"The reasonable interpretation of the whole correspondence is that the parties *intended to be reciprocally obligated when* the conditions of the contract were *fully understood and accepted by both.*"

4 Bush. 261, Calhoun v. Atchison;
16 Fed. Rep. 646, Darlington v. Foote;
27 Wis. 671, Matteson v. Schofield;
6 Munf. 83, Fitzhugh v. Jones;
32 Md. 196, Stockham v. Stockham.

The documents enclosed in the letter of August 2nd (Rec. p. 294), and August 28th (Rec. p. 222), were unnecessary formal recitals of the terms of an *understanding reciprocally and previously effected.*

The intent sought to be expressed by each was identical. Line upon line, word upon word, they concur almost exactly. The differences are so slight that they are discoverable only by the most critical comparison. Undoubtedly, had they, or either of them, have been executed, they or it would have been accepted as the *best evidence* of the *contract theretofore made* between the parties.

But the failure or neglect to execute, by either Bowman or Patrick, could *not*, by any fair and reasonable construction, operate to *abrogate* their antecedent agreement. Each was liable to the other, regardless of the non-executed evidential instruments, the one for the specific performance of his stipulation to convey his interest in their former joint enterprise, the other for damages sustained upon failure to pay the note.

The contract concluded July 16th may well be likened to "*parol* agreements for *written* policies of insurance," sustained and enforced uniformly by the Courts, in instances innumerable. There, as here, the only elements essential to constitute a binding contract are: (1) proposal and payment (promise) for insurance (surrender of note); (2) acceptance (promise to convey).

5 Ind. 96, Ins. Co. v. Jenks;
9 How. 390, Tayloe v. Ins. Co;
26 N. J. L. 268, Hallock v. Ins. Co;

5 Pa. St. 339, Hamilton v. Ins. Co;
50 N. Y. 243, Fried v. Ins. Co;
16 Fed. Rep. 646, Darlington Co. v. Foote.

CONSIDERATION here was executory—component of mutual promises: that of Patrick to cancel or pay and surrender Bowman's note; that of Bowman to surrender, or convey, to Patrick, or to whomsoever the latter should name, the former's interest in their joint venture.

It was good and adequate. At that time, July 16th, to Bowman, their enterprise had no value. It was worse than a gambler's hazard. They were joint claimants of a "vacuum," without even a vested title in that.

He believed himself well rid of a "losing deal." Further comment is idle, and the law is apt—"he has made his own bed, and he should lie in it."

ESTOPPEL. Whether or not their negotiations effectuated an agreement mutually and legally obligatory, surely the equities disclosed by this record, as arising in favor of the defendant from the conduct of the complainant subsequent to his letter of July 16th, estop the latter from a plea of *non est factum*. Says Mr. Bigelow (Law of Estoppel, p. 685):

> "Though a contract be in fact wholly *invalid* when executed, still (supposing it not to be prohibited by law as relating to some illegal transaction), *if it be acted upon afterwards* by the parties to it as valid, they will, if *sui juris*, be estopped thereafter to allege its invalidity."

In few of the adjudged cases where this doctrine has controlled, has it been invoked by equities so manifest as here? After acceptance of Patrick's proposal, Bowman abandoned utterly all interest in the progress of the work by the former. A closed chapter—to him, it might remain as sealed forever, for aught that he cared. He made no inquiries at any time, from any one. As a part owner, prudent to avoid loss, should he not have made frequent and anxious inquiry for expense accounts? With a weather-eye to possible profits, would he not have asked diligently for indications of a mineral strike? Neither of these did he.

True, there is some dispute as to what transpired at the delivering of his deed to Patrick, October 19th. But, if we are to believe the testimony of two witnesses of unimpeached character, as against that of one successfully as-

sailed and discredited, then he was as *silent and indifferent* on that day as during the entire three months prior thereto.

"Actions speak louder than words;" and, throughout that period, his conduct had said to Patrick, "Good riddance to bad rubbish; I am out of this; take care of yourself—the risk is yours alone, and welcome; henceforth, I wash my hands of the whole affair."

From and after the close of negotiations in July, Patrick bore alone the expense and risk of his enterprise, borrowing large sums of money and paying heavy interest thereon. Pursuant to their mutual understanding, he performed his part of the contract by paying off the note, in September, and, thereafter, returning it to Bowman.

It is utterly absurd and unreasonable to adjudge upon Patrick the duty of apprising Bowman of a mineral strike, when he was induced to believe by the latter's conduct, that Bowman believed, as the former believed, that the latter had no shadow of right or interest in such a discovery.

Patrick's concealment eventually, and his caution to his relatives for the withholding, of valuable knowledge from Bowman was but common and commendable prudence. A man of the most sensitive and inflexible conscience would not commit the Don Quixotic folly of informing Bowman, whose character was proved to be the reverse of a man of integrity and stability, that the thing from which he had parted freely as of *no* value had been proved to be of *some* value.

With a man of the plaintiff's stripe, such needless apprisal must have entailed inevitably upon the defendant the expense and annoyance of an action for specific performance against Bowman for the conveyance of the interest apparently his, in their joint title, whenever their deed from Stebbins and others should appear of record. Wisely, and without aught of deceit or fraud, should Patrick avoid such vexation.

Reverse the position of the parties. No mineral is discovered, and Patrick's vast expenditures are a clear loss. He sues Bowman for contribution. Shall he recover? Unquestionably the latter pleads in bar the contract of July 16th. Must not the defense be sustained, and Bowman held not liable?

One must not, says Lord Kenyon, "blow hot and cold," at the same time. Having abandoned absolutely the enterprise, the doubter and the marplot should not now share in the success wrought *solely* by him of greater faith and courage. In the case of *Cayton* v. *Walker*, 10 Cal. 450, an agreement was enforced, dissolving a partnership and vesting all its property in two of five partners, although it had *not been executed by all* the members. The Court says, Field, J., concurring (p. 456):

"Long silence, and suffering defendants to go on and make their expenditures and carry on the new enterprise, would, in equity, *preclude* them from insisting upon such a defect of execution. Moreover, it is clear to us that the plaintiff and Thomas not contributing anything as partners, or claiming to be such, and apparently, both by word and act, *abandoning* the concern and all participation therein, *can not claim* to be partners in the profits of an adventure, when they could not have been held responsible to defendants for losses."

Other courts have approved and stated this doctrine thus:

"Where the parties to a contract have *mutually recognized* its binding force upon them, *by performance* in part of its conditions, each will be *estopped from denying its obligation* upon both." Though transactions "may be ineffectual as a defense, viewed merely as an agreement, yet the promise of a party to them may have that effect as an estoppel, which it wants as a contract."

5 Hughes 191, The M. F. Parker;
5 Dow 158, Bayne v. Ferguson;
33 Iowa 491, Richmond v. R. R. Co.;
31 Ill. 437, White v. Walker;
60 Texas 545, Texas etc. R. R. Co. v. Robards;
34 Ark. 312, Coldcleugh v. Johnson;
1 Jones 290, (N. C. Eq.) Rhea v. Tatham;
2 MacN. & G. 274, McLure v. Ripley.

In reason and in good conscience, the deed of October 19th took effect, by relation, as of July 16th, and Patrick received it free of any obligation whatsoever toward his quondam associate, this complainant.

III.

Estoppel by Conduct.

Bowman's behavior towards Patrick was such as to *forfeit his right* to be advised of the progress of the work,

or of the developments in the shaft. Each was to contribute one-half of the money required for their adventure. Bowman paid nothing. Patrick contributed all the cash, and, besides, devoted his entire time and skill exclusively for their common benefit.

Thrice, when called upon for capital, Bowman refused. Even after Patrick advanced and paid out money, Bowman neglected to provide his proportion. When requested, May 8th, to repay to Patrick his share of the moneys then expended, he again refused. He dishonored Patrick's draft of May 13th. On June 19th, he paid nothing; but took credit against Patrick for part of his dues, and gave his note for the balance to May 8th only.

He never contributed one dollar of actual cash, and the total of all the credit he was ever entitled to, as even nominal contribution to the capital of the adventure, was $18.50. He obstructed the work so far as he was able, and, finally, soon after the 19th of June, he *absolutely abandoned and ignored the enterprise.*

Bowman proceeded upon the idea that he could buy a mine without money and without work—that he could sink a shaft without contributing anything but promises—that he had the right to leave Patrick to do all the work, and to pay all expenses, while he passed the summer in the woods on a pleasure excursion, free from calls for assessments, and from all disturbances of business.

From the beginning, Bowman never intended to put money into this venture. Although he had agreed that Patrick should direct and control the work, yet, when Bowman discovered that the method absolutely necessary to success required considerable outlay, he obstructed the work, objected to Patrick's management, and refused to pay his just share of the expense. Thus, Bowman became a hindrance to his partner, forcing him to do the work at his own expense, with the risk of never obtaining repayment from the former of his share, in case the venture failed. His obstruction began May 15th, with excuses for dishonoring Patrick's draft. He wrote (Rec. p. 316):

"Has the injunction suit been filed? *Do not contract for further expense until it has been.*"

Manifestly, if, despite this peremptory admonition, Pat-

rick had proceeded pursuant to his own judgment, Bowman would have assumed the right of election, to share in the profits in case of success, or to repudiate all liability in the event of failure. If Patrick had ceased pushing the undertaking, and had adopted the plan of doing a little work every ten days, *it would have resulted in total failure.* If that course had been followed, the locators of the "Little Hope" claim would have reached mineral first, would have been the first discoverers, and would have become entitled to the ground. In his letter of May 21st (Rec. p. 261), Patrick writes:

"The only way we can save ourselves is to go ahead and beat them to mineral. * * * If you do not feel disposed to go ahead under these circumstances, I think I can find some one else who will go on with me."

Again, in his letter of June 22nd (Rec. p. 262), he writes:

"I think I know a man who will take your interest off your hands and let me go right ahead with the work, which I would very much like to do."

Also, in his letter of June 28th (Rec. p. 293), Patrick writes,

"Please let me know * * * about the Col. Sellers, as I am anxious to continue work on that property and see what is there,"

as if he could not proceed with the work imperatively required without a change in the relations existing with Bowman. In his letter of July 5th, he writes (Rec. p. 324):

"I have consulted an attorney here, and am satisfied that *we are obliged* to continue the work in order to comply with our contract, and that your plan of doing a little work every ten days would not be acting according to its letter or spirit, *and would cause a forfeiture of the contract,* and loss of the amount we have spent. * * * I hope you will pay the draft, and that we may continue the work together, but if you do not, I will have to protect myself."

In his letter of July 16th (Rec. p. 332), Bowman says:

"My judgment differs from yours as to the course to pursue, and *I should not stand in your way, and will not.*"

He emphasizes this fact in the document he prepared and sent Patrick, August 28th (Rec. p. 222), where this language is used,

"Said Bowman *has been and is unwilling* to continue said work in such manner as said Patrick desires, or *to pay any of the costs thereof,* if continued in such manner as said Patrick has directed."

By his visit to St. Louis, June 19th, and the unsuccess-

ful result of his efforts to obtain money from Bowman, Patrick became convinced that he must protect himself in some way, or *abandon hope of success.*

From the beginning to the end, Bowman's conduct was evasive, unfair, dishonest. It was his duty, when requested, March 16th, to contribute to a fund out of which the cost of the contract then already made with Drummond would be paid. It was his duty, when called upon, April 1st, to furnish his share of the payment then becoming due. It was his duty, May 8th, to pay his half of the expenses then incurred and paid by Patrick; instead, he promised Patrick to honor his draft. It was his duty, May 15th, to fulfill this promise. It was his duty, when he received Patrick's explanatory letter of May 21st, to remit forthwith the amount of that draft. It was his duty, June 19th, to settle his share in full of the outlays made up to that date. It was his duty, having so agreed, to leave the direction of the work to Patrick. It was his duty, before taking his summer vacation, to provide funds to meet his share of the expenses to be incurred necessarily during his absence.

Not one of these obligations did Bowman ever even pretend to perform.

What sort of a partner was this? What duty toward Patrick did Bowman ever honestly discharge? What mutuality was there in such a partnership? What duty did Patrick owe to the man who was treating him thus? What right has such a man to claim that Patrick should have disclosed aught of the developments? With what foul hands comes he now into a court of equity, and asks release from the consequences of his own acts and defaults?

Mutuality is the essence of partnership rights and obligations. When this is destroyed by the default of one, he *forfeits* thereby his rights as a member.

Squarely in point is the case of *McLure* v. *Ripley*, 2 MacN. & G. 274.

McLure and Ripley joined in an adventure for the purchase of goods to be shipped to China, there to be sold, and the proceeds of the sale invested in a homeward cargo. The money to pay for the goods was to be supplied jointly. Ripley bought the goods on credit, and McLlure agreed to supply his share of the money in season to enable his

partner to meet his bills when due. The correspondence, conducted by Ripley, showed that there was considerable uncertainty as to their success. At the time fixed, Ripley applied to McLlure for the money, but he failed to supply it. Because of this failure, and after some negotiations, Ripley offered to allow McLure to withdraw from the adventure altogether, and this offer was ultimately accepted.

Down to the time when Ripley applied to his partner for the money, he had communicated to the latter all the information which he possessed relative to the adventure and to its chances of success; but, pending the consideration of his offer, Ripley received, from his correspondents in China, two letters, the contents of which he did not communicate to McLure. Thereafter, the latter sued to set aside the sale as fraudulent and void, because of the non-disclosure of the contents of the letters. It was held by the High Court of Chancery, on appeal, that Ripley was *under no obligation* to inform McLure of advices from China, *while the latter was in default* for his contribution to the partnership capital. Said the Lord Chancellor:

"Only consider for a moment what was the relative situation of these two parties. They had engaged for a partnership, and had agreed to be jointly interested in the adventure, and were, therefore, mutually entitled to all the information connected with it. But then, in order to entitle either party to the benefit of this joint interest, he was bound to perform his part of the contract; and the moment, therefore, that Mr. McLure declined to advance, or that he did not advance, the money when Mr. Ripley had a right to expect it from him, *he ceased any longer to have the rights of a partner*. He had no longer any right to inquire into the history of the adventure if he refused to produce the money which, according to his agreement, he was bound to contribute." * * * "Thus, then, Mr. Ripley had a clear right to say to Mr. McLure, 'you agreed to this joint adventure; perform your part of the contract, and you shall then have all the information that, as a joint adventurer, you are entitled to; but you are no longer entitled to the benefit of a joint adventurer, if you refuse to perform that which, as a joint adventurer, you are bound to perform.' There was, therefore, *no obligation at that time binding* Mr. Ripley; and Mr. McLure, under the circumstances in which he had placed himself, had no right to say, 'give me all your information, and I will decide whether I will be a partner or not.' * * * He could not withhold the money and say, 'I will not pay the money until I know how the adventure turns out.'"

See, also,

11 Irish Eq. 22, Reilly v. Walsh;
9 La. Ann. 592, Lowry v. Cobb;
1 Jones 290, (N. C. Eq.) Rhea v. Tatham;
8 De G. M. & G. 787, Clegg v. Edmondson.

PARALLEL. Here, as in McLure v. Ripley, Bowman and Patrick joined in an adventure for the purchase of a mining claim. Here, as there, the money to pay for the development was to be supplied jointly.

Like Ripley, Patrick contracted indebtedess, and, like McLure, Bowman agreed to supply his share of the money to enable his partner to meet his bills when due. Here, as there, it was *an enterprise of extraordinary hazard*, managed solely by Patrick.

Here, as there, Patrick applied to Bowman for the money promised, but he failed invariably to supply it. Here, as there, because of this failure, Patrick offered to allow Bowman to withdraw from the adventure altogether, and this offer was ultimately accepted.

Here, as there, down to the last of the many times when Patrick applied to his partner for the money, he had communicated to the latter all the information which he possessed relative to the adventure and to its chances of success; but, pending the final performance of the contract, Patrick received information (for the purpose of this parallel only, is it conceded) of mineral discoveries which he did not communicate to Bowman.

Here, as there, Bowman sues to set aside his sale as fraudulent and void, because of the non-disclosure of the information. Here, as there, *it should be held that Patrick was* UNDER NO OBLIGATION *to inform Bowman of advices of discoveries,* WHILE THE LATTER WAS IN DEFAULT *for his contribution to the partnership capital.*

IV.

"NOT PROVEN."

The complainant must be held strictly to the exact case stated in his bill, and everything which the plaintiff intends to prove must be stated therein. Where it sets up a case of fraud and makes that the ground of prayer for relief, it will not avail the complainant to show a state of facts, independent of that fraud, which might have made a case under a distinct head of fraud if charged in his bill.

1 Daniels Ch. Pr., pp. 326–8, and cases cited.

Here, the *particular* fraud charged is the concealment by Patrick from Bowman of the fact that, about August 1, 1882, these mines had been so developed as to reveal to Patrick a large body of valuable ore and to fully reveal and establish the value of said mines; and that Patrick did fraudulently conceal the discovery of said ores, and did falsely state and represent to Bowman that the work and labor done and moneys then expended had failed to discover any mineral of value, and that a large sum of money would be necessary to further prosecute the discovery of any valuable minerals in said mines.

In all the evidence, there is not one word tending to show that *William F. Patrick* ever, after the time when it is charged that ore was discovered, represented to Bowman that no mineral had been found, or that any sum of money would be necessary for a discovery. Bowman testifies that, on October 19th, James M. Patrick made some such representations. But, passing for the present the question whether that testimony is true or false, it appears that James had no authority from William to make such statements. It follows, then, that complainant has entirely *failed to prove misrepresentation*, and we may leave that question out of the discussion.

We next inquire, "Has the complainant shown that a large body of valuable ore had been discovered, or the value of said mines revealed or established, prior to the delivery of the deed, October 19th?"

The evidence clearly disproves the discovery of any ore body before August 30th, 1882. No witness testifies otherwise. August 13th or 14th, a seam of iron pyrites was struck, but all the witnesses agree that this "stringer" was of no value, either in itself, or as an indication.

There are many witnesses who speak positively of what went on from day to day, and what was the earliest moment when mineral was found. The shaft of the "jumpers" (the "Little Hope" party), was being sunk on land embraced in the Col. Sellers claim, with the knowledge that whichever party first found mineral would win the property. This was a most exciting contest. The miners were working day and night; the shaft houses were filled with armed men to prevent interference; every nerve was strained to reach mineral

at the earliest possible moment. Under such circumstances, it is certain that the very first discovery of mineral would be immediately proclaimed.

Joseph C. Whiting, Lyman Robison, Theodore C. Stebbins—co-owners with William F. Patrick, and, with him, equally and deeply interested in the event of this race—watched each day's developments. Can it be doubted but that an application by Whiting's party for the injunction, suggested by Bowman himself, would have *heralded instantly*, made *widely public*, the finding of mineral upon the Col. Sellers claim? Yet, prior to October 19th, no such application had been made. Is not this fact alone almost conclusive against Bowman's allegation of discovery?

Joseph C. Whiting testified fully, for complainant, concerning the first discovery of mineral. About August 1, 1882, he purchased, from T. C. Stebbins, an interest in the property. August 13, 1862, he had an assay made of the materials that he took, that day, from the chute he had discovered, but the assay gave *no trace of value* (Rec. p. 88).

William F. Patrick testified (Rec. p. 346):

"The first discovery we made was a little streak of mineral; it was mostly iron pyrites; it was on the 13th or 14th of August, 1882; that was quite a narrow seam and some of the owners of the mine wanted to follow that at the time, but I was opposed to it, and we continued sinking the shaft and passed through it, and in a day or two after that we had nothing in sight in the shaft except porphyry."

Lyman Robison testified (Rec. p. 447): That he was at the shaft constantly during the month of July, during which there was no indication of mineral; that the first indication encountered was a little stringer, August 14th or 15th; that, upon the discovery of that streak, he took his attorney to the shaft, for the purpose of inspection and of ascertaining whether it was sufficient for the owners to make claim for the discovery of mineral, and was advised adversely thereto; was watching the property closely at that time, for the purpose of making the first discovery of mineral; the depth of the shaft at this time was 234 feet.

T. C. Stebbins testified (Rec. p. 532), that an ore body was encountered about the last day of August; before then, there was found in the shaft what might be called a stringer of mineral; it was of no particular value because

it was iron pyrites and gangue matter; it was found about August 14th.

John D. Drummond, the contractor who sunk the shaft, testified (Rec. pp. 480–2), that, at 230 or 235 feet down, August 14th or 15th, he saw the first thing that looked like mineral; it was a cleavage in the rock, a seam, a little stringer, probably an inch and a half, possibly two inches, wide; it was pyrites of iron, with a little white talc in it, and was of no value whatever; no attention was paid to it, but the shaft was cut through it and straight down through block porphyry for 25 feet.

Despite all this positive, certain and *uncontradicted* testimony of eye-witnesses whose opportunities for observation were exceptional and unsurpassed, the trial court thus summarizes (Rec. p. 47):

"There is testimony tending to show that, about the middle of August, a vein of mineral was discovered, and, on August 16th, *a contract was signed by defendant* and the original owners of the mine *in which it is recited* that 'a lode or vein *is now believed* by all to have been struck,' and which provided for the delivery of the deed, theretofore placed in escrow, as soon as the shaft should have been sunk to the depth of 250 feet, ten feet below the depth then reached. In fact, the shaft was sunk to 265 feet, *and the deed delivered by August 31st*, so that * * * the parties in Colorado *had transferred the title, recognized* full performance, and, in fact, *it had been performed* and *mineral discovered.*"

Both as to statement of fact and conclusions, nowhere, in the entire opinion, is its inaccuracy more palpably manifest than in the latter portion of this extract.

The deed was *not* delivered until about November 1st. On this point, the only testimony in the entire record is that of Patrick himself. He says (pp. 351–2), "I received the deed on my return from the East at that time, which was about the latter part of October or 1st of November." Hence, previously, "The parties in Colorado had (*not*) transferred the title."

"They recognized full performance" of the *condition* of the *new* contract, viz., the sinking of the shaft "to the *depth of 250 feet*," as recited by the Court itself in the foregoing excerpt. *After* performance, mineral of some sort was discovered, at a depth of 265 feet, but such discovery was not

required by the new contract; and, as will appear more particularly hereafter, the kind there found was *not valuable* or "pay mineral," as contemplated by the original contract.

In the first part of the extract, much stress is laid upon the recital by the second contract of a common belief that a strike had been made, intimating clearly the court's conclusion that the defendant was *precluded*, by the execution of the instrument, from denying that a strike had been made as therein stated. We submit that such is *not* the law.

"Only the parties to a deed, and those in privity with them, can be bound by or take advantage of the estoppel created by the instrument. *The estoppel must be mutual.*" Bigelow on Estoppel, p. 334.

Wherein was the mutuality of this agreement as to Bowman? If not binding upon Bowman, how could it estop Patrick? The former was not a party to it. On the contrary, he was expressly excluded therefrom (Rec. p. 405) by the premise,

"And whereas it is believed that said Bowman *no longer has any interest* in said contract, and said Patrick is willing to protect and hold harmless the said other parties off from any claim which may be made by said Bowman."

Observe, that, at that time, August 16th, "in view of the documents which had passed around from hand to hand" (Rec. p. 82), the belief was general that Patrick had acquired Bowman's interest, by virtue of his telegram and letter of acceptance of July 13th and 16th.

The **truth** as to the real nature of the substance found in the shaft on August 13th or 14th is *correctly* detailed in the testimony heretofore abstracted of Joseph C. Whiting, William F. Patrick, Lyman Robison, T. C. Stebbins and John D. Drummond. It was *not* believed that a lode or vein of "pay mineral" had been found. Pyrites of iron, worthless for any purpose, was admitted by all to be the extent of the discovery.

The **cause** of the contract of August 16th was the compromise of a disagreement between Patrick and the other resident owners. By the original contract of February 17th, it had been stipulated (Rec. p. 300) that Patrick and Bowman should make application for patents, and should prosecute such applications diligently until patents had been obtained. At that time, the title was not disputed. But, March 18th, when Patrick's contractor commenced work,

the claims had been jumped (pp. 304–5, 531). Thereupon, as indemnity against the expenses of litigation, which had not been contemplated as any portion of the costs of procuring patents, the following instrument (pp. 285, 532) was executed and delivered to Patrick:

"Leadville, Colorado, March 27, 1882.

"We hereby agree to manage and conduct all litigation necessary to protect and defend our title and right of possession to the Col. Sellers and Accident lodes, and to pay all costs and expenses in and about the same, so far as the pending difficulty with McKenzie, McNeil, McFee and their associates is concerned, and we hereby agree to save William F. Patrick and Frank J. Bowman from any costs or expenses so far as said properties are concerned, during the time said property is worked by them under a certain contract made by them with us. (Signed) LYMAN ROBISON,
T. C. STEBBINS."

Subsequently, a misunderstanding arose as to who was responsible for the costs specified in this same document, it appearing (Rec. p. 70) to Messrs. Robison and Stebbins that they had consented improvidently to pay the *identical* expenses for which Patrick was already bound by the first contract, viz., "pay for getting the patents, which could not be obtained except by getting rid of the adverse claimants." Meanwhile, having borne alone the heavy expenses of sinking the shaft to more than 230 feet, and, by the acquirement of Bowman's interest, having become responsible solely for the performance of the existing contract, Patrick became restive (p. 69) under so severe a strain.

Pending settlement of differences with Robison and Stebbins, this much-discussed streak or "vein" of iron pyrites was encountered. On this development, Patrick formed a *claim* for relief from his burden. He stoutly asserted (Rec. pp. 69, 405) the performance of his contract, and demanded delivery of the deed, still in escrow. His claim and demand was *as stoutly denied* (pp. 69, 450), and finally, he *conceded* that they "*had no mineral in place*" (p. 450).

Here, Mr. Whiting, as peacemaker, persuaded all parties to some *mutual concessions*. Thereby, it was agreed (p. 405), "that the sinking of the shaft to the depth aforesaid (250 feet) *shall be taken to be such full performance* of this and the original contract as that said Patrick shall be entitled to receive his deed," *regardless* of what mineral, or *whether any mineral should then be reached*. The new contract (pp. 405–7)

recited the following premises *in deference* to the conflicting claims of the parties, and *as mutual estoppel:*

"*Whereas*, since the commencement of said shaft other parties have attempted to take possession of said Col. Sellers claim, and have been and now are engaged in sinking a shaft thereon, and disputes, conflicts, suits and litigation have arisen and will further spring up concerning the title to said property, and under the original and other agreements between all or some of the parties, it is left in doubt as to the person or parties liable for the expense, and *disputes have arisen concerning the claims and obligations* of the several claimants of the property *which it is desired to adjust and determine;* and,

Whereas, at the time of the execution of the original agreement, a deed to one-half of the property was executed and placed in escrow in the hands of C. C. Parsons, to be delivered upon the performance of a condition; and,

Whereas, there is *considerable uncertainty as to when said condition may be deemed to have been complied with*, and a lode or vein is now by all believed to have been struck, and it is desired to so far vary that condition or define it as to express the exact time when it shall be deemed to have been complied with; and,

Whereas, certain other things provided for by said contract are still unfinished and unperformed, and it is desired that this agreement shall fully express the present and existing convention of the parties: Now, therefore," etc.

Observe how the clause, "There is considerable uncertainty as to when said condition may be deemed to have been complied with," operated to *preclude Patrick from claiming the performance then* of the prior contract. Reciprocally, by the clause, "A lode or vein is now believed by all to have been struck," his co-owners were *estopped* (as to him) *to deny discovery of mineral.* Likewise, all together were bound by the mutual intention expressed in the clause, "It is desired to so far *vary* that condition, or define it, *as to express the exact time when it shall be deemed* to have been complied with." The circumstances incident to the execution of the new contract are narrated by two of the participants.

Lyman Robison testified (Rec. p. 451):

"I recollect well that, August 16th, 1882, I made a compromise contract with Mr. Patrick with reference to the future development of the property: *at that time*, I said decidedly that the contract of Feb. 17th, 1882, had *not* been performed; and I refused to give Mr. Patrick his deed, and I did not give the deed, and, in other words, I told Mr. Patrick point-blank that I decidedly and absolutely refused; *because we had no mineral in place*, and finally Mr. Patrick conceded the fact."

Joseph C. Whiting testified (Rec. pp. 69, 70):

"Mr. Patrick's second contract with Messrs. Robison and Stebbins

was to the effect that he should not be responsible, but that they would undertake to pay all of the expenses growing out of litigation arising through the jumpers claim; in the original contract, together with Mr. Bowman, he had agreed to get patents on the two claims, and to Mr. Robison and Mr. Stebbins it appeared, at least so they claimed, that he had agreed to do what afterwards they or he understood they should do—that is, pay for getting the patents, for the patents could not be obtained except by getting rid of the adverse claimants, and here was the conflict; the first contract stated that the deed, which was made at the time of the making of the contract, and was placed in escrow, was to be delivered under certain conditions, one of which was the discovery of pay mineral; Mr. Patrick claimed that pay mineral had been discovered, and that he was entitled to his deed; Messrs. Robison and Stebbins disputed this discovery, and now there was a row on the outside and a row on the inside; in the face of these affairs, it occurred to me, since I was satisfied that we never could get through if we began to dispute among ourselves, that it would be a fair compromise arrangement if the parties on my side could be made to deliver Patrick the deed he demanded, and he could be induced, for such consideration, to stand hand in hand with the rest of us and prorate all through on expenses, no matter how incurred; I drew up a draft of a contract and took it down to Judge Bissell's office, and suggested, as he was Mr. Patrick's attorney, to see what could be done in the premises."

The intimation of the Court that appellant can not explain or qualify the recital in the second contract of a belief that "a lode or vein had been struck," is thus answered by Mr. Justice Strong, in *Sunderlin* v. *Struthers*, 47 Pa. St. 411:

"It is an unprecedented extension of the doctrine of equitable estoppel to hold that a man is bound to the world to make good what he has said to any one if others choose to rely upon it; if every man may be held liable not only to parties and privies to his deed, but to all mankind, to make good *every introductory recital* which the deed contains, it behooves him to avoid all recitals, and be careful what scrivener he employs; *'such is not the law, and there are no authorities which assert it.*"

Having failed utterly to prove a discovery of *valuable* mineral about August 1st, as charged in his bill, complainant now relies upon the strike of a body of ore on August 30th. But it is not enough that he prove the *value*, subsequently, of that strike.

Before he can prevail, he must establish FRAUD on the part of appellant—KNOWLEDGE, *prior to October 19th, that* THAT ORE WAS VALUABLE, *that the mines were so developed as* THEN *to fully reveal and establish* TO HIM *their value*—knowledge, *certainty*, NOT BELIEF!!

Here, too, we maintain that his proof wholly fails. The

owners of the Col. Sellers mine were prospecting for "carbonate ore" (Rec. pp. 71, 347, 451, 465)—the usual character of ore in that camp. August 30th, they struck "sulphide ore"—to their great disappointment. It was so "refractory" that there was, then, no process known to Colorado smelters whereby it could be treated successfully—*it yielded no profit to its owners* (Rec. pp. 71, 347–8, 451, 465–6, 473, 481–2). Similar discoveries were *usually abandoned*. So, here, this strike was *absolutely worthless* to Patrick and his co-owners.

Beyond the point to which this ore had been penetrated—two or three feet only—they had then and could have no knowledge. Water rose in the shaft, and there remained until March, 1883, effectually staying all further development. Thereafter, the water being removed, at a much greater depth, *other quality* of ore was found which produced profit. But the ore struck August 30, 1882, incapable of "reduction," remains, to this day, precisely where and as found, *absolutely worthless now as then*.

Joseph C. Whiting testified (Rec. pp. 70–1, 73, 78–9),

The shaft penetrated a body of sulphide ore, two or three feet, when so much water came in that no further progress could be made; took samples of the ore, and discovered it to be totally unlike anything at that time being worked in the California mining district, which means the City of Leadville and all its mines; the discovery disappointed all his co-partners; it had been confidently believed that they would get ore of the usual character in the camp—carbonate ore; *for months afterwards there was a good deal of kicking among the owners* because all their efforts failed; this ore had been struck in the Wolf Tone mine, and in the A. Y. mine, 500 or 600 feet away from the Col. Sellers shaft, but no money had been made out of it, and the discoveries had been abandoned where it had been found; in both of these mines, the ore remained unutilized until very recently; it was not desirable, no smelter wanted it, the first results of shipments, by the parties to whom the mine was leased subsequently, was a call from the smelter to pay a freight bill on the ore, amounting to over $800; the ore, as they handled it, having run them that much in debt; it was universally admitted to be a very questionable find; *there was not a smelter in the State of Colorado* that was prepared to handle that ore; March 1st, 1883, the shaft was sunk to a depth of 300 feet; the ore body was struck solidly at 273 feet.

William F. Patrick testified (Rec. pp. 347–8):

"When we started that shaft—Bowman and myself and the owners of the Col. Sellers, as they stood of record at that time—we were all confident that we would strike carbonate ore; had no expectation of striking sulphide ore; at that time, nothing was known of these sulphide ores; *nobody knew the value of them;* we had the first indications of that ore August 30th, so

I was told by the head contractor, J. D. Drummond; did not see it at that time; as soon as he cut it, the water came in so badly that he had to leave; I left the same evening for Tennessee; did not see it until the latter part of October."

Lyman Robison testified (Rec. p. 451):

The mineral encountered August 30th was of no value; the treatment was so big it was not really anything; it was sulphide ore, largely composed of pyrites of iron; could not describe the extent of it, because they had just got into it; did not encounter the ore, then, that they expected to; *expected to encounter good ore, carbonate ore;* first commenced shipping ore in March, 1883; expended $20,000 in development; the first dividend was not declared until July; even then all the expenses had not been repaid.

Frank G. White testified (Rec. pp. 465-6):

Am a manager of mining properties; have been mining thirty-three years, in Michigan, Silver Island, Deadwood and Leadville, in copper, iron, silver and gold; am acquainted with the sulphide ore encountered in the Col. Sellers shaft, in August, 1882; *it had no value*, no marketable value, there was not value enough in it to warrant shipment; the smelter charges for treating it, as compared with the treatment of carbonate ores, was from three to four times the value; some carbonate ores were then treated at $4.25, the treatment of sulphide ores was from $22 to $25, and even higher; took three lots to the smelter to have it sample-tested, one lot to the Harrison, and the other two to the Omaha and Grant smelter, and there was not enough in the ore to pay the smelting charges, and it was thrown out, rendering it *absolutely valueless*, at that time.

John D. Drummond testified (Rec. pp. 481-2):

I am the contractor who sunk the shaft on the Col. Sellers claim; contract expired August 30th, 1882, when we struck a kind of mineral composed of pyrites of iron and zinc, with a small per cent of lead; it was sulphide ore, low grade and *refractory;* it was reached at a depth of 265 feet, and we struck so much water then that we could not handle it immediately; did not see the bottom of the shaft again until March 1st, 1883; during all that period, we were fighting the water constantly.

The worthlessness of the ore body encountered August 30th was not disputed. The evidence adduced by the complainant not only failed to sustain the averments of his bill, but effectually *dis*proved them. By the testimony of his chief witness, Joseph C. Whiting, complainant was "hoist with his own petard."

By that testimony, complainant should have been held *concluded* that, prior to the delivery of his deed, "the mines had *not* revealed to appellant a large body of valuable ore, had *not* fully established their value," or any value; that *no fraud* had been practised by appellant.

V.

Adequacy of Consideration.

The trial court summarizes its conclusions, and justifies its judgment, by the declaration (Rec. p. 49) that "the case comes clearly within the rule of *Brooks* v. *Martin*," 2 Wall. 70. Only hasty, scant consideration could have caused so glaring an error. There is no parallelism. Totally dissimilar are the facts. The doctrine justly, equitably controlling here is found in *McLure* v. *Ripley*, *supra*. In the former case, Judge Miller found that the faithless partner

> "Took advantage of his position to conceal from Martin the prosperous condition of the concern, and purchased from him his interest for a price totally disproportionate to its real value; and that, under *such circumstances*," the sale should be set aside.

Were the affairs of this mine in a *prosperous condition*—was the price for complainant's deed *totally disproportioned to the real value* of his interest—on the 19th of October, 1882?

More than $9,000 had been expended (Rec. pp. 345, 351), and, still, *not an ounce* of pay mineral was in sight (Error IV., *supra*). "There was a good deal of kicking among the owners, because all their efforts had failed" (Rec. p. 71). The mine was *flooded*. Costly machinery must be had, and much more money, time and labor expended before they could even commence sinking further, *through* the "worthless sulphide ore," to develop the then *utterly unknown character* of the substances *hidden deep below*. The outlay grew to more than $20,000 (Rec. pp. 152, 345, 451) before finally the courage, faith and energy of the stout-hearted was justified by a dividend.

What prosperity was *this!* How many were willing to hazard their cash in a venture so barren of result or even promise? What if Patrick *was hopeful* of the future—*believed* that "he who seeks shall find"? Did he not hope when he first risked—had he not always steadily, with unfaltering courage *striven*—striven while his faint-hearted partner "fell by the wayside"? Because, with possible bankruptcy and dishonor imminent, *he had the nerve* to discount the future, to borrow yet more money and throw it into a "devouring abyss," shall it be said, forsooth, that this was *prosperity?* Preposterous!

Thorough, searching scrutiny of this record must con-

vince that complainant received *more* than his interest was fairly worth *about the date* of delivery of his deed.

Market value, it had *not!* A "cloud" was on the title. The public refused to invest. Rival claimants disputed the right of possession (Rec. pp. 68–9, 71–2, 74–9, 86), and "were considered, by the camp at large, to have the better title" (Rec. p. 86). Shares went begging for purchasers, at even nominal prices.

True, *inter partes*, there were some transfers. But the co-owners bought for self-protection, to avoid intestine trouble (Rec. p. 80), or to prevent probable sacrificial sales to their adversaries (Rec. p. 73), whereby there would have been yet further complications of their legal troubles. In the vicinage,—where most people were familiar with the facts of development, knew the "refractory" nature of sulphide ore, were aware of the uncontrollable flood,—*it was a property to be avoided.* But those who had faith to begin were *compelled to go on*, pay assessment upon assessment, even increase their holdings,—or lose hopelessly all their original investments.

As to the "going price" among themselves, all witnesses agree. It varied from $250 to $750 per one sixty-fourth, or, upon the basis of one forty-eighth, the denomination of the subdivisions of the Bowman interest, from $333.33 to $1,000.

Joseph C. Whiting testified (Rec. pp. 73–4, 80–2, 86):

Under a judgment obtained by one McKenzie, the interests of Robison and Stebbins were advertised for sale, December 10, 1882; the sale was postponed ten days; December 20th, Robison's interest of thirteen sixty-fourths, and Stebbins' eight sixty-fourths, were to be sold; at the request of Stebbins, who was a man everybody knew and was exceptionally popular, he, Whiting, took an assignment of the judgment, paying its demand; with all his acquaintance and popularity, Stebbins had been unable to borrow the less than $200 needed to save his interest, and a trust deed for $3,000 was given by Robison upon twelve sixty-fourths of the Sellers and fourteen sixty-fourths of the Accident; September 23, 1882, Harvey Howard sold his one thirty-second interest to Whiting and Gerhard for the high price of $1,500, his interest being unincumbered by anything except the adverse claim of the Little Hope party, and was not even pledged to the payment of *pro rata* expenses under the contract with Patrick of August 16th (Rec. p. 405); November 10, 1883, Whiting sold to William F. Patrick a one sixty-fourth interest for $687.50; *afterwards*, J. J. Simmons authorized the sale of his one-eighth interest (for half of which he had paid $2,600) for $5,000; time and time again efforts were made by various owners to sell interests, or to borrow money thereon, and failed; as a matter of fact, the parties holding adversely, the jumpers, were considered by the camp at large to have the better title; witness could have secured more than one-third of the property for less than $10,000, but declined.

A. J. Gerhard testified (Rec. pp. 150–2):

In February, 1883, he bought a one sixty-fourth interest from J. C. Nead for the original cost of $500, plus the assessment thereon of about $90; about the same time, Mr. Whiting sold a one sixty-fourth for about the same price; the cost of the machinery required to control the water was about $12,000.

William F. Patrick testified (Rec. p. 345):

Subsequent to June 19, 1882, Livezay and he paid $7,639.43; in addition to that, when he returned from St. Louis, the mine was in debt; the share of this indebtedness, paid by him, was $1,011.45.

Numerous other transactions between the several owners appear in the testimony, but all such, that were closed after August 30th, when the sulphide ore was found, were consummations of agreements concluded prior to that date. All the sales selected here as bases for comparison were initiated subsequent to that time.

It should be observed that the Howard interest brought an abnormally high price (Rec. p. 80), because "it was not even pledged to the payment of *pro rata* expenses under the contract with Patrick" of August 16th (p. 405). And, further, that the discovery of August 30th did not appreciate the value of interests between themselves, is demonstrated by the sale of Nead to Gerhard, in February, 1883 (p. 150), of a one-sixty-fourth interest, for what it had cost in July, 1882, to-wit: $500,—with assessments added.

At first, Bowman held a one-fourth interest in these mines. By his sale (Rec. p. 215) to James M. Patrick of one-third, his share was reduced to two-twelfths. By further sale to Livesay (Rec. p. 320) of one-fourth, he was left with but five forty-eighths of the whole. This interest, upon the basis of the sales and options set forth in the foregoing testimony, might possibly have produced values as follows: Sold by Robison, $1,666.67; bought by Whiting, $3,125; sold by Nead to Gerhard, $3,333.33; sold by Simmons, $4,166.67; by Whiting to Patrick, $4,583.33; by Howard to Whiting and Gerhard, $5,000; the average of these six sales and options being $3,645.83.

When Bowman sold to James M. Patrick, he remained bound, for one year, for the assessments on the latter's share. June 19th, he settled with William F. Patrick, for his *three-eighths* of the latter's outlay on their joint account,

by note (Rec. p. 319) for **$288.70.** But this settlement included no items subsequent to May 8th (pp. 317–18). Between these two days, Patrick had expended the further sum of $603.75 (pp. 317–18, 326), of which *three-eighths*, or **$226.41,** was payable by Bowman, it being arranged that Livesay should pay the remaining one-eighth (p. 320). When Patrick left Leadville, August 30th, he and Livesay together had paid an additional sum (p. 345) of $7,639.43, of which seven-eighths, or $6,684.50 would have been chargeable to the joint account of "Patrick & Bowman," if the latter had retained his interest. To this last sum, must be added $1,011.45, assessed upon the same seven-eighths interest, and paid by Patrick, about October 19th. Of the aggregate of these last two items, $7,695.95, *three-sevenths*, or **$3,298.26,** was chargeable to the interest previously held by Bowman.

If we assume, for argument's sake, that, on October 19th, Bowman still retained his interest, not having closed a sale previously, then, at that date, there was due and payable, from him to Patrick, the several sums hereinbefore specified, $288.70, $226.41, $3,298.26. For the aggregate of this indebtedness, **$3,813.37,** he received full acquittance.

Thus, at a time when there was *no* market value, he received $167.54 *more* than the *average* "going price," between the owners, of $3,645.83!

Of what "advantage" taken, can Bowman complain? *Wherein*, how far, was he injured? Did he, *in fact*, receive an *in*adequate price? Could he have hoped reasonably to have obtained a greater sum from other co-owners? They were staggering under burdens then too heavy. *How many* would have accepted his interest gratuitously, *conditioned upon indemnity* to him against this just charge of $3,813.37?

Suppose that he had been advised fully of all details of the situation; that he had become imbued with Patrick's belief that, *beneath* the refractory sulphide ore, more valuable mineral might be found; how would he have been benefited?

When, on June 19th, the outlay was but $2,078.25 (Rec. p. 318)—$1,474.50 *plus* $603.75,—he was unable or unwilling to pay aught besides a bagatelle for legal services rendered to Patrick (p. 319). On October 19th, when the total expense

chargeable against the original "Patrick & Bowman" interest aggregated $9,774.20, he had neither *paid nor offered* to pay *one penny* in cash!

"Coming events cast their shadows before,"

and common wisdom teaches us to judge the future by the past. Having paid nothing theretofore, could he have been expected to amend his conduct thereafter! What probability was there that he was able—or, if able, *willing*—to pay his proportion of the $12,000 then required for pumping machinery (Rec. pp. 151-2)?

Does not this record of his uniform defaults *justify* the assumption that he *never* intended to contribute aught to the actual outlay? Is it not plain that he proposed to "dead-head" himself into a share of the profits, if any, without one particle of risk or danger of loss to himself?

Having struggled thus far, heavily handicapped by this burthensome "Old Man of the Sea," what further obligation of disclosure was there upon Patrick? Was it his duty to *carry* longer so impecunious or penurious a partner? How pertinent is the language of the Lord Chancellor (Error III., *supra*): "You *agreed* to this joint adventure; *perform* "your part of the contract, and you shall then have all the "information you are entitled to; but you are no longer "entitled to the benefit of a joint adventurer, if you refuse "to perform that which, as a joint adventurer, you are *bound* "to perform."

On the 19th day of October, when he delivered his deed, did Bowman *inquire* the state of the account, or *proffer* to pay any portion thereof? Neither of these, did he!

Justly, clearly, does it appear: that appellant took *no* advantage of complainant; that he concealed *no prosperous* condition; that, under the circumstances, he paid *more than fair, full* value for all he received.

VI.

Partnership v. Co-Tenancy.

The theory that guided the Circuit Court in the determination of this case is thus stated (Rec. p. 41): "Complainant

and defendant were partners in this contract, and the *first question* to be considered is the law which controls in *sales* by *one partner to another*."

Howsoever plausible its reasoning, if its minor premise be false, it could hardly fail to arrive at an erroneous conclusion. Is the premise true? What, *in law*, was the *relation* between appellant and appellee?

> "The fact that the contract may be denominated by the parties a partnership, or that they declare in it that they do not design becoming partners, *is controlled by the nature of the contract.* If it constitutes a partnership, it is one; and if not, not, independent of the language of the parties. * * * And so, if the parties have used the word partnership in their contract and called themselves *partners, this will not make them such if the contract is not consistent* with such relation."
>
> Bates on Partnership, § 18.

Here, complainant alleges and appellant admits (Rec. pp. 2, 7), "that it was between the plaintiff and defendant agreed that said defendant should, acting as well for himself as for the plaintiff's interest, as his *equal partner*, proceed to develop and open said mines." But, within the same sentence, appellant expressly qualifies his use of the two words italicized above, and limits their meaning to the sense wherein they are specially applicable, by adding "that said agreement was under and in pursuance of a *contract which is hereinafter specified*."

By the contract referred to (Rec. pp. 8–9, 299–300), by the complaint, and by the evidence herein, it appears that complainant and appellant made an executory agreement to purchase, and did purchase, jointly, an undivided half interest in some mines—realty—each to contribute one-half of the money required to comply with the conditions of sale.

The document evidencing the "agreement to purchase" does not differ materially from similar instruments. It contains no other than usual recitals of the terms of sale. It is silent as to the relations then subsisting, or thereafter to exist, between the vendees.

Neither is there any other written instrument purporting to define their relations, or to alter their respective positions from the normal status of parties *sole*. Nor can a partnership be inferred from their correspondence. Therein appears no declaration or admission not fairly and reason-

ably consistent with the purpose of co-tenants to improve jointly their real estate.

Natural conditions are presumed to continue until a change is demonstrated. So, partnerships are not presumed, but must be proved, and the burden is on him who alleges. There being no written evidence of such relation between Bowman and Patrick, it must appear, if at all, by parol. But, here also, the testimony is equally inconclusive.

Frank J. Bowman testifies (Rec. pp. 153–5, 177–8):

"I was willing, if Patrick would join with me or superintend the working operations, to go in with him and purchase an interest and sink the shaft or shafts, whatever might be necessary; I don't think arrangements between Mr. Patrick and myself individually were reduced to writing; we were each to contribute one-half, and to have an equal interest in the matter; we were to get an undivided half between us, and were to be *equal partners* in both mines; I recollect, in a general way, that the expenses of sinking a shaft were to be borne between Mr. Patrick and myself, and that, for so doing, we were to receive and were entitled to a one-half interest in the property; my understanding is that we entered into a contract by which we were to sink a shaft for the discovery of mineral on certain terms, and to receive our title when that mineral was found, but what was to be done after that by way of developing and operating the property I do not know; I can not say now what was the agreement as to that; I was to obtain jointly with Mr. Patrick a half interest; it would be, mathematically, deducting half of a half, a fourth."

William F. Patrick testifies (Rec. p. 303)):

"We were each to pay one-half of the expenses for sinking this shaft to pay-mineral or limestone. The only arrangement was that I was to inform Bowman from time to time of expenses, when they would become due, and he was to remit to me from time to time as I notified him. He was to remit to me one-half of the expenses that had been incurred up to the time I notified him."

Almost none of the essentials of a partnership appear in these statements. There was neither provision for capital, nor firm name, nor period of duration, nor arrangement for operation of the mine upon compliance with the terms of purchase. There was neither *jus disponendi*, nor mutual agency, nor power to pledge, borrow or bind upon joint account. Either party could, and one did, make a valid transfer of an interest in the property, in his own name, regardless of the knowledge or consent of the other, and without violence to their agreement.

11 Me., 488, Gilmore v. Black.

Complainant—a lawyer—testifying in his own behalf,

and in support of the bill drawn by himself (Rec. p. 162) was careful to repeat (p. 155) the words here italicized, "*equal partners.*" But the needless emphasis of reiteration does *not prove* the fact, and serves only to illustrate the well settled rule stated by Mr. Bates, that merely *calling* "themselves partners will not make them such if the contract is not consistent with such relation."

His testimony and the material allegations of his bill disclose the facts of a contract consistent only with the relation characterized by the law as that of *tenancy in common* —this, and nothing more.

Mr. Bates (Law of Partnership, Sec. 64) thus summarizes the doctrine of the authorities: "An agreement to buy or hold land in common *does not create a partnership.*"

"A single special venture, entered into by two persons, on joint account, to purchase a tract of land, each agreeing to pay one-half of the purchase price and expenses, does not create a partnership in respect to the land, but merely makes them *tenants in common.*"

142 U. S. 682, Clark v. Sidway;
6 Gray 434, Sikes v. Work;
11 Me. 488, Gilmore v. Black;
56 Vt. 633, Farrand v. Gleason;
4 Cow. 166, Ballou v. Spencer;
28 Pac. R. 736, (Mon.) Harris v. Lloyd.

Since complainant and appellant were but tenants in common, there was *manifest error* in applying to their transactions *inter se* the law applicable only to the relation of partnership.

VII.

Mis-Judgment.

FIRST. The bill should have been dismissed, because of complainant's failure to prove its material allegation (Rec. p. 2), "that all sums of money from time to time found necessary and required for such purpose were well and truly *paid, a one-half by each.*"

He had alleged previously (Rec. p. 1), "that such half interest should be conveyed to them in consideration of the moneys to be by them furnished, paid and advanced, *a one-*

half to each of them." Without the subsequent averment, the bill would have been demurrable clearly, because of failure to show such performance on his own part as to entitle him equitably to relief. Equally, *without proof* of such material matter, did his case fail.

On this point, complainant produced no testimony other than his own (Rec. p. 156–9), and this was not only meagre, but misleading and even *false*. He made no attempt to state the amount of money that had been paid on October 19th, neither had he the hardihood to swear that he had paid his proportion of that sum—whatever it might have been. Instead, he endeavored to excuse the omission: (1) by stating that he settled with appellant *in full*, June 19th; (2) by averring that he gave his note, as payment in advance, for accounts *to become due thereafter;* (3) by declaring that, after June 19th, Patrick made no further demands for money for expenses.

The first and second statements were willful falsehoods. The third was an effort to reverse the axiom that, "no man shall profit by his own wrong," as, by his own conduct, after the time stated, he had misled appellant and *prevented purposely* the making of demands (see Errors II. and III., "Estoppel," *supra;* also *Hope* v. *Lawrence*, 50 Barb. 258).

That no money had been demanded *did not excuse* his silence or indifference when he delivered his deed. He knew that heavy expenses had been incurred prior thereto, and since his "settlement;" that his erstwhile co-contractor had carried the heavy burden at great personal inconvenience. He knew that large sums were then assessable upon the interest to be conveyed, and which he must pay, if he would retain that interest and fairly entitle himself to participate in possible profits. But he was *not able* to pay such assessments, he told the witnesses, James M. Patrick, William Patrick and William H. Wilson (Rec. pp. 527–8, 134–5, 417), and assigned his share to one who *would and did pay*.

October 19th, the total expenses chargeable against the original "Patrick & Bowman" interest, *and paid by appellant at the time when needed*, was $9,774.20 (Error V., *supra*). Of this sum, $4,077.62 was payable by the Bowman share, and, of this, he had settled for no more than $552.95 (of the

$737.25, due May 8th, Livesay having paid $184.30). On the date of conveyance, the balance against him was $3,524.67. Of his proportion of the expenses, he owed *more than eighty-six per cent.*

But, as a part of the consideration for the transfer, his note for $288.70, representing a portion of the $552.95, payable May 8th, was returned to him. Thus, the balance due on his share, *not paid by him*, was $3,813.37. *He lacked more than ninety-three per cent of paying the one-half alleged in his bill*, and the judgment should have been for the defendant.

SECOND. The judgment was erroneous, because it was based upon the *hear-say testimony* of the letters of appellant's mother and father, dated respectively August 17 and 24, 1882 (Rec. p. 481). Appellant is not connected with these letters. They were written neither to nor by him, but were from one third person to another third person. The rule as to their inadmissibility is so familiar that the citation of authority would be a reflection on the learning of an appellate tribunal.

When testifying before a commissioner, appellant was asked, on cross-examination (Rec. p. 377),

> "X 199 Q. Did you not, in the month of August, take measures of any kind to prevent any member of your family from letting out the information of the discovery of ore in the Col. Sellers shaft, so as to prevent it from getting to Bowman before you got his deed?"

Had he been thus interrogated in open court, he would have been excused from answering. As asked, the question was improper clearly. It was *not certain:* no time was stated; no member of his family was named; the communication, if made, might have been privileged. Without the protection of the court, the witness stated, "I did, to some extent."

Yet question and answer together, even if admissible, did not establish the *competency* of these particular letters. He assented to a vague, general statement, in a leading question. It did not appear with *whom* he communicated, or *how*—whether verbally or in writing. But the letters quoted from by the court bear internal proof that the offering of them in evidence was an attempt to put into the record *indirectly* the identical matter *rejected* (Rec. p. 39) by

Judge Miller. They purport to disclose *secondarily* the contents of *other letters which were privileged communications.*

The father and mother were not divulging contents of letters received directly from appellant. They were narrating, at *second-hand*, in their own language, their understandings of, and their *conclusions* from, that which had been reported to them, by *parol*, of what had been *written by a husband to his wife*! The best evidence of *what* he said to her, and *why* he said it, was the letters themselves—but they were inadmissible for any purpose. Themselves incompetent, the wife could not testify as to their contents. How, then, could others testify as to what *she told them?* Ossa upon Pelion!

If, wisely, the rule excludes "hearsay," how much the more certainly must it preclude "hearsay *upon* hearsay"? How utterly unreliable is such testimony, appears from these same letters. In the letter of August 17th, are the expressions, "found mineral," "a clearly defined mineral vein extended entirely across the shaft." Appellant was not made to say "pay" or "valuable" mineral. Of course, pyrites of iron was referred to.

In the letter of August 24th, the wife is made to report that her husband "writes her the mine is all right;" "going through a body of mineral that pays." The writer *volunteers unsolicited* (*he* had received no letters from appellant), "you must not write anything to St. Louis about it, as William has not got Bowman's deed yet, only has a written promise for it. If you have written to any person, caution them to say nothing about it."

Obviously, all these expressions are the constructions and conclusions of the person writing! "More than pleased with the outlook," "the mine is all right," "resolved not to sell, but to hold on,"—even if his exact language,—were but the exuberance of a hopeful husband confiding to the sympathizing partner of his life; they but illustrate the *ever-sanguine spirit of the miner*, buoyed up with the courage that never despairs, is daunted by no disasters. How apparent, here, his self-deception! We have seen (Error IV., *supra*) how all the witnesses agreed that the substance found August 13th or 14th was wholly worthless, "did not contain a trace of value"—"even as an indication"—"led to

the *hope* of finding mineral about one time in a hundred, not oftener than that (Rec. p. 463, A. 21),"—and "*disappeared altogether* from the shaft within a few feet from where encountered."

Shall such testimony, most of which was by owners earnestly interested in an early discovery, be *out-weighed* by the garrulities of these gossiping *third*-hand letters—disconnected, unauthorized?

By their consideration, appellant was injured through the unjust imputation of *fraudulent* concealment. The only statement in the record that lends even the *faintest tinge* of color to such charge, as manifested by any act of appellant or by his authority, is the reply quoted above (Rec., p. 378). This, he immediately explained and justified, as follows:

> "I felt that if Bowman, having only this letter of the 16th and his written promise that he would sign a certain paper—that if Bowman heard of the other ore, any strike in the Col. Sellers, or that the Col. Sellers was looking any better, that he would back out of *any agreement he made*, and I would have to *sue him for specific performance* in order to induce him to give *the deed that he had agreed to do in our correspondence*, and also in this contract of August 28th.
>
> X 200 Q. And you took these precautions to prevent that from getting out on August 28, 1882, and no contract was signed by him to make you a deed until after that?
>
> A. Yes; he had signed this letter of July 16, 1882, which was almost identical with the contract which was afterwards signed and sent by me."

In preceding pages (Error II., "Estoppel"), reference was made to Bowman's conduct toward Patrick subsequent to July 16th. From and after receipt of Bowman's letter of acceptance, of that date, Patrick believed that a contract had been concluded between them. He believed reasonably that Bowman reciprocated his belief. But, even though the contract had been sealed, and otherwise executed with the utmost ceremonial known to the law, he felt that Bowman's word was *not* "his bond;" that the latter would not fulfill *voluntarily* this or any promise, whatever the obligation, if he should conceive a possible advantage by refusal.

In presenting with clearness and *truth* the *motives that influenced and justified* Patrick in precautions against a suit

for specific performance, Bowman's character for *honor and veracity* becomes, of stern necessity, the subject for criticism. Since this appeal was taken, complainant has met the fate of all things mortal. Gladly would counsel avoid aught but the speech of kindness. But the tenderness of charity toward the dead should not hinder *all justice to the living!*

"The evil that men do, lives after them."

This suit, commenced in the speculative spirit of gain, survives the speculator. If fruition of the seed he planted stains, perforce, his memory, it is to be regretted, but duty toward courts and clients must be done. The direct conflicts in the testimony of complainant and appellant in their accounts of transactions between themselves, without others present—the former's accusation of the latter for unfair, dishonest, fraudulent dealing—compel an issue of character.

Upon the record of this case, appellant stands unimpeached as a man of truth and veracity. His testimony was full and fair, his answers clean-breasted, howsoever unfavorable to himself; and, wherever possible, he was corroborated and supported by many respectable witnesses. On no point was he contradicted, except by complainant. How is it with the latter?

Frank J. Bowman resided and practiced law many years in St. Louis, Missouri. At this trial, six witnesses, long his fellow citizens (three of them, members of the bar of that city), testified (Rec. pp. 508–516) that his reputation for truth and veracity in that community was bad; that they would *not believe him on oath, testifying in a case in which he was interested!*

He made no attempt, he called no witnesses, to rebut this impeachment. So bad was his reputation, so discredited generally was complainant in the estimation of his neighbors and professional brethren, that not one man could be found to speak well of him, to give his testimony respectability. On the stand, his demeanor was that of the interested, insincere, evasive witness, whenever a truthful answer would tend, ever so slightly, to his disadvantage. Where he could not or dared not asseverate favorably to himself, he invariably insinuated, equivocated, distorted!

Observe how he dodged the many questions as to how much he had actually paid toward sinking the shaft! How

flatly was he contradicted by the witness Wilson as to where and when they first became acquainted (Rec. pp. 182, 524)! Remarkable his memory, so clear and full on some points, so dim and dull on others. How convenient the possession of his books and papers by Mrs. Bowman! What forgetfulness of the transaction with James M. Patrick! His testimony was replete with vagaries of every description. Such strangers were he and Truth that it might be said, in charity, that he was incapable of traveling mentally in a "right line."

Is it to be wondered that Patrick desired delivery of the deed to which he was justly entitled, before a man of so little honor should seek to repudiate his obligation? Was there *fraud* in such motives, founded on *such* reasons? Based upon such finding, from such incompetent evidence, the judgment is contrary to law.

THIRD. With no uncertain sound, the equities herein demand reversal of this most unjust decree. It contravenes all the reliable testimony. *More* than equity, *more* than justice, *more* than charity, did this appellant, "in season and out of season," to appellee.

From the inception of this enterprise, Patrick became liable primarily, without security, for the payment of Bowman's share of the outlay. Six times did he ask for aid, and, each time, was disappointed,—before, on June 19th, face to face, at the latter's home, where he had been compelled to seek him, the account was *partially* adjusted. Here, the trial Court distinguished (Rec., p. 47) *McLure* v. *Ripley*, *supra*, by finding that, on this date,

"The parties had *settled*, and complainant had made *satisfactory* arrangements for *his share*."

How had it been settled, and *how much?* Patrick had asked for "bread and been given stone." Having urgent need of *cash* for their joint benefit, he received a *credit* for legal services, an order on Livesay (which might or might not be paid), and a *promissory note* for the balance. How can it be imagined that this was "satisfactory"? Before the note was of any value to him he must and did endorse it, becoming personally liable for its payment.

Even then, no part of the outlay subsequent to May

8th was included in this so-called settlement. Bowman's plea of pauperism was patiently submitted to, because there was no other alternative, and Patrick, himself in financial straits, borrowed (Rec. p. 321, A. 201) money on his own account, to prevent failure of their undertaking.

This was the meeting at which the Court found (Rec. p. 42, line 6) that "nothing had been said in reference to a sale." Evidently appellant's positive testimony (p. 322, A. 205) had been overlooked. Even appellee durst not deny it (p. 239, A. 530). If it had not occurred, he would not have hesitated at a flat denial. He shrunk always from direct contradictions of Patrick's positive statements, and resorted to subterfuges.

At this time, Patrick's long-tried forbearance seems, most naturally, to have reached the limit where "patience ceased to be a virtue." He realized the necessity of a change of partners, if he would not lose his time, labor and money. Believing that he knew a party who would take the interest of Bowman upon the terms offered by the latter, payment of the note and assessments, he wrote the letters of June 22nd, 27th and 28th, proposing transfer in his own name. Thereafter, finding himself mistaken as to the willingness of the third party, he reconsidered his proposal, and sought to withdraw it by his letter of July 5th (Rec. p. 324–5).

The court's criticisms (Rec. p. 47) of this letter are ill-considered, not warranted by the evidence. Neither is the construction just of the letter (same page) to his brother, wherein he stated that he had written to Bowman, *acting upon his attorney's advice*. True, he did not expect payment. Why should he? Thus far, despite repeated, urgent calls for help, complainant had *not paid one penny in cash*, or, in any other way, given substantial assistance.

How flimsy Bowman's excuse of his "custom" of summer vacations in Wisconsin pineries, to shirk his duty toward his co-contractor. Did he notify Patrick, when they contracted together, in February, that he might be expected to be three months in default on his contributions, during his annual playtime; that he would flee from the city's heat —and his debts—to the coolness of northern shades, while

the other was held to the scene of their joint enterprise, in a "neck and neck" struggle with rival claimants for mineral? Had such notice been given, is it reasonable that such contract would have been made?

Will a court of equity say that Patrick was under the slightest obligation, legal or moral, to "carry" complainant, under ANY *circumstances?* If not, then how much less the duty in this situation? Certain conditions and obstacles must be met and overcome speedily by Patrick, or he must fail. Legally and morally he was entitled to relief from the incubus of an associate who was either unwilling or unable to comply with their contract, "one-half to each."

Counsel's advice was commendable. Pursuant thereto, Patrick did *not* intend "to get rid of his partner." Fairly and honorably he sought to give Bowman reasonable notice that he would no longer carry a double burden; that the latter must assume and bear his share, or Patrick would ask for a novation of their contract, would "have to protect" himself. Was it not a case, an urgent one, for protection?

That appellant did not desire to acquire Bowman's interest for himself, is shown by his offer of it, subsequent to the conclusion of the contract of sale, for no greater price than its exact cost in expenses paid by himself. Joseph C. Whiting testified (Rec. p. 86):

> "Mr. Patrick offered me the Bowman interest, or all that remained of that interest, which was five forty-eighths of the whole property, for the amount of money, as near as he could figure, that he had spent up to the date of his offer upon that interest under his contract, and I declined the offer; the sum asked was $2,300, and this was about the time of our entering into the agreement with Mr. Patrick (Aug. 16th)."

Appellant testified (Rec. pp. 362, 366) that he directed his letter of July 5th to Bowman, at St. Paul, Minn., because he had had some intimation that letters would be received by him, at that point, about that time. That he must have been thus advised, and correctly, appears from the presence of Bowman, at St. Paul, within ten days thereafter. The draft was sent "no protest," because Patrick had paid protest fees (p. 404) of $2.75, upon the bill dishonored by Bowman, at St. Louis, in May. He did *not* resort to strategy, knew that Bowman was hunting in Northern Wisconsin, but *had good reason to and did believe* that he would come to St. Paul soon, and that the draft *would reach him.*

It has been shown (pp. 32–3, *supra*) that the attempted withdrawal *failed*, because neither this letter, nor the telegram of July 15th (Rec. pp. 239–40), was received by Bowman prior to the posting of his letter of acceptance of July 16th. Being advised by this letter that Bowman had closed the sale, and intended to hold him to the terms of his offer, Patrick accepted his legal status, and acquiesced in the obligations it imposed.

The remark (Rec. p. 47), "He seems to have left immediately thereafter in *search* of complainant," is another misconstruction of appellant's motives. Not only is it opposed by the testimony generally, but it is particularly refuted by the letter of September 2d, offered in evidence by complainant (p. 263), who, therefore, is bound by its contents.

Appellant's motive was no more than the very natural desire of a husband to visit his wife after a long separation. Mrs. Patrick was then at Knoxville, Tenn., where appellant went, and remained about six weeks. *En route*, he passed through St. Louis, and availed himself of the opportunity thus presented (*not sought*) to call at Bowman's office; not finding him, he wrote him, and continued his journey to his destination.

Still another strained effect is the criticism (Rec., p. 48) of this same letter, "The *obvious intimation* of which was against the completion of the contract, receipt of the deed, or the discovery of mineral." As to the deed, it had *not* been received (Error IV., *supra*). As to the contract and mineral, "the obvious intimation" is based apparently on the words, "the shaft is still going down." Patrick stated what he *believed* to be true (Rec. p. 350), learning later that he was mistaken, that work had been stopped by the water. He left the same evening that the sulphide ore was encountered, without having seen it; never saw it until about March 1st (p. 348).

This was a legitimate, natural letter, chiefly discussing other matters of business. No intimations were made or intended. Bowman had sold his interest, and Patrick had bought it. The former was no longer concerned in affairs

of the Col. Sellers and Accident claims. But, casually, in mentioning some unfinished details of their arrangements, Patrick stated what he believed to be true, supposing Bowman might have a little natural curiosity as to the condition of property wherein, previously, he had been almost an owner. That is all there was in the "intimation."

The comment (Rec. p. 49) on appellant's letter of October 29th, to his brother, garbles its language. Replying to a telegram asking for data for a bet, appellant wrote (p. 252) in a hopeful spirit, but *very indefinitely*, that, with the water under control, he *thought* that from $8,000 to $80,000 might be taken out within a year. *Observe how much in the dark* they were as to the value of their discovery. The first figures would represent a *loss*, as the mine could not have been operated for that sum. The only definite statement as to the *speculative* value of their interests, irrespective of the unknown worth of the mineral, appears in the language with which he justified the bet:

> "I have been offered since I came back $3,000 for one-sixteenth interest; at that rate, our combined interest is worth now $21,000, *so we could get $8,000 and more out in that way, which would cover the bet*, I suppose."

In excuse for Bowman's long and singular silence, prior to commencment of this action, it is remarked (Rec. p. 49), "*He who acts in good faith* generally presumes that the party with whom he has been dealing has acted in like good faith, and may safely rest upon that presumption until facts are called to his attention which indicate the contrary."

Transpose the proposition. In good faith, Patrick embarked in this adventure, presuming that Bowman's intentions of fair dealing were no less sincere than his own. He put up his own money, strained his credit, *on faith* that Bowman would promptly and fully repay his proportion. When his eyes were opened, and suspicion became conviction that he had been made "the victim of a confidence game," he asserted manfully his right of self-protection, by proposing to acquire Bowman's interest.

When the trade was closed, realizing, from his recent experience, that his late associate had absolutely no sense of the equity of "fair play," Patrick felt that he could rely no more securely upon Bowman's performance of his new

promise than of the old. Hence, *faith*fully performing on his own part, he so acted, in wise discretion, and without guile, as to compel Bowman to *keep faith* for the *first* and only time in their dealings.

"Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and *never* for an alleged fraud unless the fraud be made clearly to appear." "It ought not," says Judge Cooley, "to be lightly made or accepted. *All presumptions are against it.* The accused party, in common fairness, is entitled to a FAVORABLE CONSTRUCTION OF ANY CONDUCT REASONABLY CONSISTENT WITH INTEGRITY."

94 U. S. 214, Atlantic, etc. Co. v. James;
55 Mich. 629, Pierce v. Pierce.

Is *this* a clear case for the exercise of this most extraordinary power? Have all the presumptions in appellant's favor been overcome? *Has* FRAUD *been made* CLEARLY *to appear?*

Investigated calmly, deliberately, dispassionately, there is *no word or act* of appellant, whereof the easy, natural, plain construction—that first suggested to an unbiased mind—is *not reasonably consistent* with fairness, *integrity*, EQUITY!

When this voluminous record is summarized, and *all* the material facts are marshalled, it must appear that the complainant has proved *none* of the essentials of his bill. But appellant does not rest his request for dismissal upon the hope of a "Scotch verdict."

He does not ask that the evidence be tested by the rule of "reasonable doubt." With the confidence of innocence, he challenges the judgment of the searchers of consciences upon the purity of his motives. He trusts that they shall *so say* that all men may know that the cloud of suspicion no longer shadows him; that these foul charges have no foundation in truth; that, in all things, his conduct toward complainant has ever been that of a man of honor!

Conclusion.

We submit:

That a valid contract was concluded between appellant and appellee, without undue advantage to the former; that the latter received good and sufficient consideration for his interest; that, because of his recognition of the contract, because of his uniform default in the performance of his obligations as a partner, because of his long and unexplained neglect to allege his injury, appellee is estopped from claiming the consideration of a court of equity; that appellant practiced no fraud upon appellee;

Wherefore, the judgment of the Circuit Court should, in all things, be reversed, and the bill dismissed, with costs.

Respectfully,

CHARLES C. PARSONS,
Solicitor for Appellant.

149 U.S. 411

Office Supreme Court U. S.
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CLERK

Supreme Court of the United States.

OCTOBER TERM, 1892.

CASE NO. 13,742. TERM NO. 157.

WILLIAM F. PATRICK,
Appellant,

vs.

FRANK J. BOWMAN TO THE USE OF DENNIS P. SLATTERY,
Appellee.

APPEAL FROM UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLEE.

E. McGINNIS,
Attorney for Appellee.

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Opinion of Court below

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BRIEF FOR APPELLEE.

STATEMENT.

This is a suit brought on October 15th, 1886, by Frank J. Bowman against Wm. F. Patrick and James M. Patrick to rescind a sale made October 19th, 1882, by Bowman to Wm. F. Patrick, his then partner, of his five-forty-eighths interest in the Col. Sellers and Accident Mines at Leadville, Colorado, and for an accounting of the profits

since received by Wm. F. Patrick from that interest, he being charged by Bowman with having concealed from him discoveries of ore in one of said mines in the summer of 1882, and thereby having induced him to part with his interest at much less than its value. The suit resulted in a decree in the Circuit Court setting aside the said sale and adjudging that Wm. F. Patrick refund $57,099.69, the amount of profits received by him on said interest to March 19th, 1889, the date of the final decree. From that decree he appeals to this court.

It appears, from the record, that in February, 1882, Frank J. Bowman then a resident of St. Louis, Mo., was temporarily in Leadville, Colorado, on legal business as the attorney for Wm. F. Patrick, who then lived in Leadville. While there W. H. Wilson, a mining broker, introduced Bowman to T. C. Stebbins who, with others, owned two adjacent mining claims near Leadville, known as the Col. Sellers and Accident claims on which no shaft had then been sunk to mineral, and it was then unknown whether the property had any value. The owners were looking for some one who would sink the shaft in search of mineral for an interest in the property. Bowman, at Stebbins' request, visited the property and was pleased with it and its surroundings and soon afterwards asked Patrick to join him in sinking a shaft on it (pp. 296–297). The result was that on February 17th, 1882, Bowman and Patrick entered into a written contract with Stebbins and the other owners to sink a shaft on the property to limestone in place or bed-rock, if pay mineral should not be sooner found, and to obtain patents from the United States to said property, in consideration of all which Bowman and Patrick were to jointly receive an undivided one-half of the property and a deed for such half was then made by said Stebbins and others to them and placed in *escrow* to be delivered to them when the shaft reached limestone in place or bed-rock, or pay mineral if it should be reached above limestone in place

or bed-rock (pp. 8, 9). The mineral in that district lies in nearly horizontal bodies at the contact between porphyry and limestone, the porphyry being the overlying rock and of varying thickness. Through the surface dirt and gravel known as "wash" and the porphyry the shaft was to be sunk. The indications which generally appear in a shaft, if there be an ore body below and it be near, are that the porphyry becomes iron-stained and sometimes small seams or stringers of mineral are found in the porphyry leading to the mineral body below.

Bowman and Patrick were as between themselves to be equal partners in the venture, each paying half the expenses. Patrick living at Leadville was to superintend the sinking of the shaft and keep Bowman apprised of all that should happen relating to the partnership venture. Bowman returned to St. Louis a few days after the making of the contract with Stebbins and others and was never again in Colorado except for a few days in the early part of May, 1882. Patrick, in March, 1882, and for some time afterward was indebted to his attorney Bowman for money advanced by Bowman on account of the legal business then in Bowman's charge. The sinking of the shaft on the Col. Sellers under Patrick's superintendence was commenced about March 15th, 1882, and continued with a few interruptions until August 30th, 1882, when it entered an ore body, having encountered at different times in July and August, 1882, many and increasing indications of an approach to an ore body. After Bowman last met Patrick in Colorado about May 6th, 1882, they never met again, except on June 19th, 1882, in St. Louis, until October 19th, 1882, in St. Louis, when Patrick obtained a deed to Bowman's interest. The communications between Patrick and Bowman from June 19th, to October 19th, 1882, were wholly by letter and telegram, all of which are hereinafter set forth. Patrick gave Bowman no information of the discovery of ore, but on the contrary, on September 2d,

1882, three days after the shaft had entered an ore body, he wrote to Bowman intimating that no discoveries had been made, and Bowman on October 19th, 1882, executed his deed to Patrick for his interest in the property for a small consideration and in entire ignorance of the discoveries previously made. The mine soon became a large producer and continued to pay dividends exceeding $100,000 a year. Bowman hearing of these dividends and having no suspicion of having been defrauded sent his congratulations to Patrick, but in October, 1886, because of a dissension in a branch of the Patrick family, certain letters written by the Patricks to each other, and containing statements that Wm. F. Patrick had discovered ore in the Col. Sellers mine in the summer of 1882, and was then concealing the fact from his partner Bowman until he could get Bowman's deed, were shown to Bowman. It was an astonishing revelation to him and he brought this suit the next day.

Besides the concealment of the discoveries of ore and of the previous indications of its nearness, there were other acts of concealment and double dealing on the part of Patrick affecting Bowman's interest and tending to make him more ready to let go his interest, which acts will be hereinafter specifically mentioned.

On March 25th, 1882, Bowman by written assignment let his friend James M. Patrick, the brother of Wm. F. Patrick, have one-third of his one-half interest in the contract with Stebbins and others, or of his one-fourth interest in the entire property, without increase of price and on James' representation then made that he had not the money to pay his share of the expense of sinking the shaft, Bowman agreed to advance it for him for one year and without security. James had previously sought an interest from his brother William, but was refused it except on terms with which he could not comply. James, nevertheless, afterwards assisted William in con-

cealing from Bowman the discoveries of ore until William could get Bowman's deed.

On May 6th, 1882, when Bowman was last in Colorado, W. H. Wilson claimed that as he had introduced Bowman to Stebbins and had been instrumental in procuring for Bowman the contract for acquiring an interest in the property, therefore, in fairness, Bowman should let him have a share in the contract. To this Bowman assented, and then assigned to Wilson a one-fourth interest in the contract. On May 11th, 1882, Wilson assigned this interest to John Livezey. These assignments to James Patrick and Wilson left Bowman the owner of 10-48ths of the contract or 5-48ths of the entire property, which was the interest he conveyed to Wm. F. Patrick on October 19th, 1882.

POINTS AND AUTHORITIES.

(1.)

The partnership between Bowman and Patrick is admitted (Printed Record, p. 7).

Such joint operations in mining constitute a mining partnership.

Manville v. Parks, 7 Colo. 133.
Dougherty v. Creary, 30 Cal. 290.

(2.)

"A member (of a mining partnership) may assign his interest without the consent of his copartners, and the act does not work a dissolution of the partnership. The person to whom the interest is assigned becomes a member of the company, and it is not necessary that the other members consent thereto."

Higgins v. Armstrong, 9 Colo. 46.
Bissell v. Foss, 114 U. S. 260.

(3.)

When one partner seeks to buy the interest of the other in the partnership property, he must not only make no false representation, but also must not, by remaining silent, conceal anything which might affect the value or price.

Pomeroy v. Benton, 75 Mo. 531.
Story's Eq. Jur. (11th Ed.) Vol. 1, Sec. 316*a*.
Bigelow on the Law of Fraud, p. 312.
Pomeroy's Eq. Jur., Sec. 901.

And the duty of a partner to make a full disclosure is particularly strong when he is in charge of the business and the other, whose interest he seeks to buy, is absent. In such case he must communicate to the absent partner all

that is known to himself, so that the absent partner may be enabled "to form a sound judgment of what he was selling."

Brooks v. Martin, 2 Wall. 70.

(4.)

When there appear in a shaft indications that it is approaching an ore body, and these indications are known to one of the owners who is seeking to acquire his partner's interest in the property, then, even though such partner may be insolvent and delinquent in paying his share of the expenses, the indications must be communicated to such partner by the one seeking to purchase his interest.

Johnson v. Perens, 3 Smale & Giffard, 419.

(5.)

"In making a contract parties are as important an element as the terms with reference to the subject-matter. Mutual assent as to both is alike necessary."

Nat. Bank v. Hall, 101 U. S. 43.

On the general subject of contracts by correspondence.

Minneapolis Ry. v. Columbia Rolling Mill, 119 U. S. 149.

Bishop on Contracts (2d Ed.), Sec. 323.

(6.)

When fraud alleged against a defendant is the subject of inquiry, evidence of similar frauds attempted by him a short time before is admissible to show his motive and purpose in the case under trial.

Castle v. Bullard, 23 Howard, 172.

Wharton on Ev. (2d Ed.) Sec. 33.

ARGUMENT.

I.

A short time before, and also during the existence of the relations between Patrick and Bowman, as to the Col. Sellers and Accident mining property, Bowman was jointly interested with and was also the attorney of Wm. F. and James M. Patrick, in matters relating to the "St. Louis" mining claim. He was also advancing for them money for expenses on account of that business (Printed Record, pp. 297, 298).

As foreshadowing the treatment Bowman was to receive from the two Patricks in the Col. Sellers matter, the following letter which came into Bowman's possession in October, 1886, but which was written by Wm. F. Patrick to his brother James, on December 23d, 1881, less than two months before the making of the contract as to the Col. Sellers, in which letter is outlined a scheme to fleece their co-owner and attorney in the St. Louis claim, while he was rendering services and advancing money for them on its account, is significant (pp. 247–8).

"I wanted to see you, however, in regard to the St. Louis, and what I wanted was this. I think that Mr. Bowman is somewhat anxious to have a larger interest than he now possesses, and think he would be willing to buy an eighth as a speculation, and what I wished you to do was to see him and, *without exhibiting any anxiety* to do so, try to sell him that interest. I would start the price at about *$15,000 or $18,000*, but I think if you can get $10,000 in cash, it *will be a mighty good sale*. That will leave us a clear title to 2-8 and the possibility of getting back the 1-8 to Chase in 1878. ***My reasons*** for thinking that amount a good bid for the property, I could give you more fully in person, but briefly they are that Blow, who was surveyor for the Colorado Prince at the time they were working, and who was frequently in the mine and all through it, says at no time did they ever see any well defined body of ore, and the fact that they have not done any work for so many months, rather confirms me in that belief. Blow says that in his judgment *$15,000 would be a large price for our 3-8. Another reason* for my belief is that the cost of the suit which amounted to only $538.00 were not paid till one day after the time set by the court, and *a more convincing one* is the fact that the miners at work

in the Miner Boy at the time of my visit there had not been paid for three months, which certainly does not indicate a very healthy state of the mine. Mr. McKinzie and I while at the mine, selected from a large pile of ore in the shaft house two pieces of ore that we considered the best we could get. I had Fred. Bruen crush and assay them together, and the result was 7 ounces silver and 3-10 ounce gold to the ton. We may have been mistaken in making our selections, but I don't think we were. *For all these reasons I think it advisable to try Bowman, and I think it better for you to do so than for myself, as you could represent to him that you were in need of money, and we can divide up afterward if you get it.*"

James acted in accordance with the directions and suggestions of the letter, and for sometime afterwards importuned Bowman to buy the interest, but without success (pp. 271, 409).

Wm. F. Patrick in his deposition and in answer to his attorney's questions mentioned the McDermith Placer and the examination he made of it for Bowman in February, 1882, about the time of the making of the Col. Sellers agreement, and in so doing unconsciously opened the way for other written evidence of his double dealing towards Bowman. He testified (p. 298):

Q. "Had you any interest in the Green Mountain Boy claim and *McDermith Placer* at that time? A. No; none at all.

Q. You were simply to examine these properties and report to him for his accommodation? A. That is all."

The following telegram and letter, taken in connection with that testimony, show that, while he was pretending to act as the agent and in the interest of Bowman, he was secretly interested and acting against him. The telegram was received by Bowman when sent in February, 1882, and the letter came into his possession in October, 1886. On February 15, 1882, Wm. F. Patrick and W. H. Wilson telegraphed Bowman (p. 275):

"Examined Placer claim; can get perfect title; twenty acres patented; thirty thousand dollars; great bargain; shall we close? Answer immediately."

On March 22d, 1882, Wm. F. Patrick wrote to his brother James, at St. Louis, that Wilson would soon arrive in St. Louis, and in that letter said (p. 275):

"He goes on business of his own, and also on some *in which we are interested together. He will explain to you probably about our Placer claim, in which we have been trying to get Bowman.*"

The two Patricks are thus shown just as they are entering into the Col. Sellers transaction, to be two-faced, double-dealing, instinct with treachery and ready to seize upon any opportunity that might offer by which they could overreach Bowman.

II.

Their course of acting and dealing in the Col. Sellers matter, henceforth the sole subject of consideration, will now be more fully set forth, and it will be seen that the proof of their wrong-doing rests mainly upon letters and other writings, and is complete even though Bowman's testimony were omitted.

In March, 1882, certain persons designated as "jumpers" made an adverse claim to the mining property on which the shaft was to be sunk (pp. 12-304). W. F. Patrick was led by the conduct of the "jumpers" to get from Stebbins and Robison, the two resident owners of the Col. Sellers, a contract of indemnity against all costs and expenses of litigation that might be caused by the jumpers. The contract in full is as follows (pp. 284-5, 67, 69):

LEADVILLE, COLORADO, March 27th, 1882.

We hereby agree to manage and conduct all litigation necessary to protect and defend our title and right of possession to the Col. Sellers and Accident lodes, and to pay all costs and expenses in and about the same, so far as the pending difficulty with McKenzie, McNeil and McFee and their associates is concerned, and we hereby agree to save William F. Patrick and Frank J. Bowman from any costs or expenses, so far as said properties are concerned, during the time said property is worked by them, under a certain contract made by them with us.

(Signed) LYMAN ROBISON,
T. C. STEBBINS.

Patrick wrote to Bowman on April 1st, and again on April 13 (pp. 259-60), concerning the Col. Sellers, but never mentioned to him then, or at any other time, that he had obtained a contract of indemnity. Bowman never heard of the existence of that contract until it was incidentally mentioned in the deposition of J. C. Whiting (the manager in 1887 of the Col. Sellers mine), taken in this case at Leadville, in May, 1887 (pp. 67, 69, 270). Whiting was then friendly to Patrick and not acquainted with or inclined towards Bowman (pp. 64, 551). His deposition was taken on written interrogatories early in the case. No interrogatory related to the contract, because Bowman was not then aware of its existence, but the witness in giving the general history of the business affairs of the mine mentioned this contract, evidently not aware of its importance. He did not have the writing itself, but he gave its contents as nearly as he could recollect them, and said they related to costs and expenses of litigation. He got his knowledge in Leadville in 1882, where he then lived and when he was acquiring an interest from Stebbins and others (pp. 67, 69). On the cross-examination of W. F. Patrick (p. 389), he was asked about an indemnity contract from Stebbins and Robison, and he said it was lost. He was asked to give the contents. He gave neither the true date nor true contents, but said it was dated some time in May, 1882, and related only to the loss caused by the blowing up of the shaft. Patrick then put Stebbins on the stand and took his recollection of the matter, and he said that it related only to the blowing up of the shaft (p. 532). The defendant had now overcome Whiting's statement of its contents by two witnesses, and thus made it appear that Whiting was mistaken, and so the matter would have rested had it not been for the subsequent disagreement between Patrick and Whiting (p. 551), which caused Whiting to hunt for a copy of the contract, which, when found, he gave to complainant's counsel (p. 284),

who immediately served a copy with notice upon the defendant to produce the original. Finding that his concealment of the date and contents of the contract could be no longer maintained, he produced the original. He thus kept it concealed and misrepresented its contents until January 31, 1888, long after this suit was commenced (pp. 284, 285), and while thus concealing and falsifying its contents, he testified in enumerating the burdens that were borne under the contract to sink the shaft, that the expense of getting the patents "involved the taking care of these adverse suits" (p. 349), and stated in his sworn answer on file in this case (p. 12), that on June 19th, 1882 (the last time he saw Bowman until he got his deed on Oct. 19th, 1882), this litigation caused by the jumpers involved "a large expense to *plaintiff* and defendant Wm. F. Patrick in protecting and defending the title to the Col. Sellers and Accident Mines," and that then, June 19th, 1882, "*plaintiff complained of* the expense attending the development of said property *and the costs of the litigation aforesaid, and expressed a desire to be relieved of the same.*"

James M. Patrick, who joined in the foregoing statements in the answer, also testified that Bowman told him in the fall of 1882 after the sale, that "the constant fear of litigation and jumpers" (p. 417) was of itself a sufficient cause for selling his interest. Thus it appears from their own pleadings and testimony that Bowman was complaining of and fearing these costs and expenses when Wm. F. Patrick, while listening to the complaints and fears, held for himself and Bowman a contract of indemnity against these costs and expenses, which contract he kept from the knowledge of Bowman and also from the knowledge of the court until its disclosure was brought about as above mentioned, long after the commencement of this suit.

A short time after the making of the indemnity contract the shaft was injured, May 16th, 1882, by an explosion

of giant powder, supposed to have been placed there by the jumpers (p. 306). It cost $394.85 to repair the damages caused by the explosion, and Patrick claimed of Stebbins & Robison that they should refund the amount—they assented, and in May, 1882, gave him their note for the amount which they subsequently paid to him (pp. 390, 453). He included the $394.85 in the accounts of his expenditures in sinking the shaft. He concealed the existence of the agreement to refund, and the note, not only from Bowman, but from Livezey, also, who shortly afterwards became a part owner under the contract to sink the shaft, and paid to Patrick his share of the expenses, including the $394.85 (pp. 325, 328). Bowman & Livezey never heard of the agreement to refund the $394.85 and the note and its payment to Patrick until in 1887, after this suit was brought, when the facts came to their knowledge through evidence taken in this case (pp. 539, 542, 270, 384, 407–8).

III.

Although Patrick was indebted to Bowman, he, as soon as the sinking of the shaft was commenced, made demands on Bowman for money. On March 16th, 1882 (p. 258), Patrick asked Bowman to send him $500. He was then in debt to Bowman (pp. 359, 394). The total cost of the first 100 feet, according to Patrick's statements (p. 259), would be $1,350. Of this amount 15 per cent. was to be reserved until the contract was completed. The shaft was 100 feet deep on May 16th, when it was blown up (p. 306). The payments were to be made every twenty-five feet in depth. The work was commenced on March 15 (p. 302). The first payment to be made would be $288.12 for both of them. Bowman's share would be $144.06. Patrick admits he owed Bowman $264.23 (pp. 359, 394). There was certainly no delinquency in declining to send to Patrick $500 when Patrick then owed Bowman more than enough to pay

Bowman's share of the first payment when it should become due. It was but reasonable and proper that Patrick should apply to Bowman's share of the payments when they should become due what he owed Bowman, and when that was exhausted to advance for Bowman an amount equal at least to the amount Bowman had advanced for him.

While Bowman was with Patrick in Colorado in May, 1882, they had an adjustment of their accounts, and it was found that, including some payments yet to be made by Patrick on the first 100 feet (pp. 310–11), Bowman would owe Patrick $288.70 if Wilson paid his assessment, and $465 if he did not, and as Patrick says, "the understanding between Mr. Bowman and myself was that I was to draw for either $465 or $288.70" (p. 312). Wilson's time to pay would expire on May 18th. On May 13th, Patrick drew on Bowman for $465 (p. 312). Immediately on presentation of the draft on May 15th, Bowman telegraphed to Patrick: "Must know Wilson's conclusion. Rebates not satisfactory. Answer at once." And on same day wrote him as follows (pp. 315–16):

"Wilson made a claim (all Leadville seems to be a 'claim') for an interest in the 'Col. Sellers' and 'Accident.' I yielded to his request; it was my duty to do so, and stated that he could name the interest he wished to represent. He named the interest and promised his share of the money; you were to collect of him, or forfeit his claim for non-payment. Your brother's interest I agreed to carry, and am willing to, but now you draw on me without collecting of Wilson or securing his relinquishment; this much I expected you to do. I have telegraphed you, but can get no answer. I leave in an hour for Chicago. Most business affairs I can understand. Leadville is to me a little incomprehensible. I want an explanation. Yours truly. (On margin is the following): Has the injunction suit been filed? Do not contract for further expense until it has been. Telegraph me.

FRANK J. BOWMAN."

On May 11th, two days before Patrick drew the draft for $465, Wilson had assigned his interest to a man named

Livezey, who, it appears from the record, was always ready to pay his share. Patrick's name appears as a witness to this assignment of May 11th (p. 308).

The Wilson contract and assignment are as follows (p. 308):

This memorandum of agreement, made this 6th day of May, A. D. 1882, by and between Frank J. Bowman and Wm. H. Wilson, witnesseth: That, in consideration of services rendered, and as full compensation therefor in the matter of securing a contract with T. C. Stebbins and Lyman Robison for sinking a shaft on the Col. Sellers and Accident lodes, and securing a patent therefor for a one-half interest in said properties, it is now therefore agreed between the parties hereto, that said Wilson shall have a one-fourth of said Bowman's interest, *i. e.*, a one-eighth of said contract, said Wilson paying his proportionate share of all expenses incurred under said contract, payment to be made within ten days after receiving from said Patrick notice of the amount due, and failure to do so shall work a forfeiture of this contract; time of payment as above being by agreement the essence of this contract.

FRANK J. BOWMAN,
W. H. WILSON.

On the back of the contract is written the following assignment from Wilson to John Livezey, Jr., dated May 11th, 1882, and attested by W. F. Patrick:

LEADVILLE, COL., May 11th, 1882. For value received I do hereby transfer all my right, title and interest in and to the within contract to John Livezey, Jr. As witness my hand this day and date above written.

Witness: W. F. Patrick. W. H. WILSON.

On June 3d, 1882, Patrick wrote to Bowman as follows (p. 400):

"Major Wilson came to me this morning and told me he had transferred his interest in the Sellers to a named Livezey, *and he wanted to pay his assessment*. I told him that the time had expired, and that I could not take it without referring the matter to you. * * * I wish you would let me know by telegram if you are willing to let Wilson in, as I told you when you were here, *I would rather you would not*, as when we have so many in it, it is hard to manage. If you don't consent I will go to St. L. for a few days, and we could arrange a little pool there and raise money enough on part of our interest to complete the contract without any further expense to ourselves, and retain control of it."

It thus appears that when Patrick drew the draft on Bowman on May 13th, for $465, instead of $288.70, he concealed from Bowman the fact that the Wilson interest had been assigned two days before, on May 11th, in his presence as the attesting witness, and then on June 3d, he wrote to Bowman of the assignment as if he had just heard of it, and refused to accept the money then tendered for expenses on that share of the contract. By refusing to let his brother James have a share of his interest, except on conditions with which James could not comply (p. 249), James was turned to Bowman and got one-third of Bowman's share under the following very favorable terms to James (p. 215):

"This memoranda of agreement,

WITNESSETH, That James M. Patrick, has this day purchased from Frank J. Bowman a one-third of his one-half interest in the property adjoining the A. Y. Mine near Leadville, Colorado, the same being the property acquired by contract with Stebbins and others in which William F. Patrick is a one-half owner; the consideration of this agreement being the sum of one dollar this day paid, and the further consideration that said James M. Patrick is to pay a one-third of the cost to said Bowman in carrying out the contract for sinking a shaft on said premises; that is to say, said James M. Patrick is to pay a one-sixth of the total cost and said Bowman agrees to make all necessary advances of money for said purposes for one year, and save said James M. Patrick from the necessity of making advances during said period of time; and said James M. Patrick agrees to well and faithfully repay to said Bownan within twelve months from this date all sums so advanced by him on account of this contract and pursuant to the terms thereof.

Signed in duplicate, this 25th day of March, 1882.

FRANK J. BOWMAN,
JAMES M. PATRICK.

This much of the Bowman interest having been drawn into the Patrick family while Bowman was to advance the expenses, it seems that the remainder of the interest was also to be sought for the Patricks, so Wm. F. Patrick, on June 3d, 1882, having, as he thought, got Bowman in a mood to let go his interest easily, by concealing from him both the indemnity contract for expenses of litigation, and

the note for $394.85, did not like to see the interest go to Livezey, who was at Leadville, and ready to pay, and, therefore, on June 3d, he wrote to Bowman not to let Livezey in. Patrick soon afterwards went to St. Louis to see, and talk with Bowman, concerning the Col. Sellers matters, and while there, on June 19th, 1882, they had a settlement of their accounts. Patrick since claims that several items were left out of the settlement. On that settlement a balance of $288.69 was found due from Bowman (p. 319), for which he gave his note to Patrick, who immediately had it discounted for its face in St. Louis (p. 392). $245.75 of that $288.69, was for James' share of the expenses which Bowman was to advance for him, and for which amount James soon afterwards gave his note to Bowman (p. 393). The Livezey interest was recognized by Bowman and Patrick was directed by him to receive the expenses tendered on that share by Livezey at Leadville (p. 320). Patrick then started back to Leadville, having left Bowman on June 19th in St. Louis despondent, and complaining of the costs and expenses for which he then secretly held the indemnity contract and note. Having got Bowman ready to let go, Patrick could not wait until he got home, but on June 22d, at Denver, reached back, what is now seen to be since everything has been uncovered, this sneaking hand for the interest he thought he had made ready for gathering in, but which he then feared to openly take (p. 262).

"*In regard to your interest in the Col. Sellers, I think I know a man who will pay the note you gave me, $288.69, and take your interest off your hands and let me go right ahead with the work, which I would very much like to do. If you are willing to let it go on these terms, which is the same proposition you made me in your office, please telegraph me immediately and I will try to make the arrangement.*"

In less than two weeks afterwards he tried to get it by other methods, and without paying even the $288.69.

IV.

On June 19th, 1882, at the meeting between Patrick and Bowman in St. Louis, Patrick was informed by Bowman that he would in a few days start to the woods of Northern Wisconsin to remain for the summer, and that his address during that time would be Bayfield, Wisconsin (p. 321). James Patrick also testifies: "He (Bowman) said that he had given my brother that address (Bayfield) for the purpose of enabling him to communicate with him as to payments when they became due" (p. 420). Wm. F. Patrick then agreed to wait awhile on Bowman for his share of the expenses (p. 319). In thus agreeing he was but returning the favor previously shown him in money matters by Bowman, and was recognizing the generous action of Bowman toward his brother James for whom much the larger part of the postponed payments was to be made. Besides, Patrick had just borrowed $4,000 from James' brother-in-law, Ward McManus (pp. 321 and 392), part of which was to be used in sinking the shaft, and so would not need money for some time. The "St. Louis" consolidation scheme was not yet finished, as all the letters show. Bowman had advanced money for Patrick in that matter, and there was great probability that he would have to make other advances, which would be brought into account when he and Patrick should have their next settlement.

Bowman left St. Louis soon after June 19th for Wisconsin, and did not return until after September 10th, 1882 (pp. 321, 339). Both the Patricks left St. Louis on the evening of June 19th (pp. 322, 414, 423). James went to Tennessee, and Wm. F. to Leadville where he remained until August 31st, 1882. From June 19th until October 19th, 1882, when Bowman and the Patricks next met, no communication passed between James and Bowman (pp. 423–4–5), and the only communication between Bowman and W. F. Patrick was by letters and telegrams. This correspondence

in full, all of which is hereinafter referred to, consists of the letters of June 22d, June 27th, June 28th, alleged letter of July 5th, telegram of July 15th, letter of August 2d, and letter of September 2d, from Patrick to Bowman, and telegram of July 13th, letter of July 16th, and letter of August 28th from Bowman to Patrick. Various indications of the nearness of mineral appeared in the shaft of the Col. Sellers in July, and the mineral itself was struck in August, 1882.

Before Patrick's letter of June 22d, above mentioned, reached St. Louis Bowman had left for his hunting camp in Wisconsin. The letter was forwarded to Bayfield. It reached him in the woods, and on July 13, 1882, he came to Ashland, Wisconsin, a town about equi-distant with Bayfield from his camp, and where there was a telegraph station, and sent this telegram to Patrick at Leadville (pp. 329, 272, 276.):

"Yours of June 22d received yesterday; proposition accepted; send note."

On June 27th, and again on June 28th, Patrick, at Leadville, wrote to Bowman, at St. Louis, in relation to the Col. Sellers; on June 27th as follows (pp. 276, 383):

"*I would also like to have an answer in regard to the proposition I made you about the Col. Sellers, to return you your note and forfeit your share in the contract. There is a party here who will take it.*"

And on June 28th as follows (p. 293):

"Please let me know what we are to do in this new complication, *and also about the Col. Sellers, as I am anxious to continue work on that property and see what is there.*"

These letters were forwarded to Bayfield (p. 272):

On July 5, 1882, Patrick wrote the following to his brother James (p. 250):

"*The shaft in the Col. Sellers is looking very promising; for several feet the porphyry has been heavily iron stained, and I have good reasons for thinking that we are near the contact.* Acting on Col. Bissell's ad-

vice, I to-day wrote to Bowman *telling him* that if he did not pay up, I would apply to the owners of the ground for a new contract in my own name, and leave him out. *I don't suppose he will pay, but I will let you into the new one on the same terms you are in the old.*"

Patrick claims that on July 5th, he wrote the following letter to Bowman. It was addressed not to St. Louis, or to Bayfield, but to St. Paul. Patrick says this is a copy of the letter (p. 324):

LEADVILLE, July 5, 1882.

MR. FRANK J. BOWMAN, Merchants' Hotel, ST. PAUL, MINN.

Dear Sir:—I send you a statement of all amounts paid on the Col. Sellers contract *since* our settlement, from which you will see that the amount due from you thereon is $952.32, for which amount I will draw on you to-morrow. I wish to notify you and hereby do so, that if the draft is not paid, that I will apply to Stebbins and Robinson and their partners for a new contract in my own name. I have consulted an attorney here, and am satisfied that we are obliged to continue the work in order to comply with our contract, and that your plan of doing a little work every ten days would not be acting according to its letter or spirit, and would cause a forfeiture of the contract and loss of the amount we have spent in sinking the first 100 feet. The same attorney also tells me that under our contract, if you do not pay your proportion when called upon, you forfeit your rights under said contract. I want to deal fairly with you, and will tell you that in my opinion the shaft, which is now 165 feet deep, is looking very promising, and I think we are not very far from the contact. My reasons for thinking so are that porphyry is now heavily iron stained. Hope you will pay the draft and that we may continue the work together; but if you do not I will have to protect myself, and will do so by taking the new contract as I have said.

I withdraw my offer to return your note for $288.70, dated June 19, 1882, in case you assign your interest in the contract to me.

Yours truly, W. F. PATRICK.

Plaintiff says he never received that alleged letter, and contends that the original letter was returned to Patrick from St. Paul. Plaintiff further contends that the words "I want to deal fairly with you, and will tell you that in my opinion the shaft, which is now 165 feet deep, is looking very promising, and I think we are not very far from the contact. My reasons for thinking so are that the porphyry is now heavily iron stained," appearing in the

copy written and put in evidence by Patrick, were not in the original letter. The draft on Bowman for $952.32, which includes the amount of James Patrick's share of the expenses and also part of the $394.85 expenses for repairing the shaft, for which Patrick secretly held Stebbins and Robison's note, was on July 6th, mailed to the bank at St. Paul, and was returned to Patrick because Bowman was not at St. Paul. (p. 327, 394.)

The following is from the cross-examination of Patrick in regard to the alleged copy of the letter of July 5th (p. 362):

Q. After you left St. Louis on June 19, 1882, on your way back, at Denver, on June 22d, you wrote Bowman the letter of June 22d, in evidence? A. Yes, sir.

Q. And addressed that to the city of St. Louis? A. Yes, sir.

Q. Your answer to that was received by telegram of July 13, 1882, from some place in Wisconsin? A. Ashland, Wisconsin.

Q. The next answer to it was Bowman's letter of July 16, 1882, referring to it? A. Yes, sir.

Q. Did you at any time between June 19, 1882, and July 13, 1882, receive any communication from Bowman, either telegram or written, relating to any other matter had between June 19th and July 13th? A. I cannot recollect any, but I must have received one, because I addressed my letter of July 5th to him at Merchant's Hotel, St. Paul, Minnesota. I must have received some intimation of that change of address in some way or other.

Q. Well, where is that letter or telegram? A. I haven't found it; I do not know where it is.

Q. Will you swear there was one? A. No, I will not; I say there must have been one, or I should not have written to St. Paul, Minnesota, instead of Bayfield, Wisconsin.

Q. It is not a fact that you did write to St. Paul, Min-

nesota, at that time prior to July 13, 1882, and in which you sent that draft for collection, because you knew he would not be there at the time and would not get the letter? No, sir; it is not.

Q. And whatever letter you did write there, didn't it come back to you? A. No, sir; I do not remember to have ever seen it; I am positive I have not. The draft came back.

Q. You had directed that no protest be made upon the draft, didn't you? A. Yes, I think I did.

Q. Why was this? A. The other draft I sent Bowman for $465.00 I had to pay protest fee of $3.95, or something like that.

Q. Then you knew that this draft would not be paid? A. I did not think it would be; no, sir.

Q. That is why you didn't want any protest made? A. I didn't want any protest fee.

Q. How could you account for Bowman's refusal to pay if you really sent him the letter on July 5th, as you say by your copy in evidence; how could you count on Bowman's refusal on that information to come up and pay; why would you know beforehand that he would not pay the draft, and direct the bank not to protest that draft? A. How did I know? I didn't say that we were in a body of mineral in that letter; I said that the shaft—that the indications were very favorable, and I wrote that he would pay, so that I could go along peaceably, in that letter.

Q. Didn't you say in the copy of the letter that you have put in the record that the porphyry was heavily iron stained, and that you had good reason to believe you were near a good ore body? A. Yes, sir.

Q. Now, why would you, if you had really written a letter containing that, conclude before he did get it, conclude that he would not pay, and direct the draft to be returned without protest? A. As I stated before, I put that "no protest" there to save myself protest fees.

Q. Didn't you believe at the time that the draft would not be paid? A. I did not think it would because Mr. Bowman had expressed himself when I was in St. Louis, on June 19th, as being dissatisfied in the way the work was going on, and he wanted to do a little work every ten days, and I wrote him in that letter I had consulted Col. Bissell and it would not be a fulfillment of that contract.

Q. But on June 19, 1882, there was no intimation that there was any mineral as you gave on July 5th? A. No.

Q. Now that you did know it on July 5th, and say that you put it in the letter to him, why would you conclude or believe that he, with the information in his possession, would not come forward and pay?

Objected to for the reason that it is calling for the reasons of the witness as to what would in his estimation operate upon the mind of a man who was fifteen hundred miles from him, and also upon the mind of a man who had let draft returned before that, and had grudgingly paid whatever he had paid in the performance of this contract and permitted his partner to bear the burden of the contract up to this time.

Q. I will now show you a letter of July 5, 1882 dated, Leadville, July 5, 1882, addressed "Dear Brother," and signed by yourself, the letter which was put in evidence already by the plaintiff in this case, being his Exhibit No. 4, and ask you if that is your writing? A. Yes, sir; that is my writing.

Q. In that letter you say:

"The shaft in the Col. Sellers is looking very promising; for several feet the porphyry has been heavily iron stained, and I have good reasons for thinking that we are near the contact. Acting on Col. Bissell's advice, I to-day wrote to Bowman, telling him that if he did not pay up I would apply to the owners of the ground for a new contract in my own name and leave him out. I don't suppose he will pay, but I will let you in on the new one on the same terms you are in on the old."

Why did you write to your brother stating that you didn't suppose Bowman would pay, if you had written

to Bowman giving him the information that you say you did in your so-called letter of July 5th? A. Because he had paid so reluctantly on June 19th that I didn't think he would pay.

Q. On June 19th you hadn't any such information as this to give him? A. No, sir; but I gave it to him on July 5th.

Q. Then why did you suppose that if he got this encouraging information in regard to the mine that he would refuse to pay?

Objected to for the reason that the answer called for does not go to prove any issue in the case; because it is not calling for the statement of any fact, and because the question as to whether he thought Bowman would pay or not is totally immaterial and irrelevant to the issues in this case.

Q. Was not it your intention at this time to get, now that you knew or believed that you were near the ore body, to get Bowman out, and were you not then engaged in manufacturing letters which you could afterwards show and claim that you had sent him if he should find out that he had been defrauded and sue you? A. No, sir; I wrote just exactly what I put down there.

Q. Did you not, in your telegram to Bowman of July 15, 1882, telegraph to Bowman, among other things: "See my letter of July 5th?" A. Yes, I did.

Q. To where was that telegram directed? A. That telegram was directed to Ashland, Wisconsin, and also a copy of it was sent to St. Louis.

Q. You knew, then, by receipt of his telegram, dated the 13th day of July, that he was in Wisconsin? A. I supposed he was; yes, sir.

Q. Why didn't you, if you wanted him to get hold of any letter of that kind, say in your telegram of July 15th, "see my letter of July 5th *addressed to you at St. Paul?*" A. I supposed he had gotten it, because only a few day's

afterwards I received a letter from Bowman written from St. Paul.

Q. That was on July 16th? A. Yes.

Q. You received a letter written by Bowman July 16, 1882, at St. Paul, in which no reference is made to this letter of July 5th, didn't you? A. Yes.

Q. Does he not state in that letter of July 16, 1882, that from the subsequent letters he says you still wish him to let go his interest on surrender of the note? A. The letter does state that.

Q. Now, in your pretended letter of July 5, 1882, is not there a clause there that you withdrew that offer? A. Yes, there is.

Q. Now how could Bowman on July 16, 1882, if there had been any such letter as July 5th, addressed to him at St. Paul, make any such reply as that?

Objected to, because the answer called for is not the statement of any act; is simply argumentative, and asks for the witness to state how the plaintiff, who was at St. Paul or Wisconsin, could have done certain things if certain other things were done, and for the further reason that if he did, that it appears in testimony the plaintiff may have entirely ignored the withdrawal of the proposition contained in the letter of July 5th, referred to, and the subsequent telegrams of July 15th, and insisted upon accepting the previous proposition of June 22d.

A. I presume he just simply ignored that.

(*By Mr. Parsons*): I object to the witness stating what he presumed if he knows anything about it.

Q. (*Mr. McGinnis* continues): Then when you received that letter written by Bowman July 16, 1882, in which you would see from its tenor that he hadn't received your letter of July 5, 1882, why didn't you repeat to him the information in your so-called copy of July 5th, about your near approach to the mineral, so that he would be fully informed? A. I thought that Mr. Bowman had received my letter of July 5th and had simply ignored it, and that it was still his desire to have that note returned to him

and to get out of the contract; that he was unwilling to go ahead in the manner that I wanted to, and that he wanted to get out and to be relieved from any further liability in the case in the matter.

Q. Then, if you thought anything of the kind, why did you in your telegram of July 15th, say: "See my letter of July 5th?" A. I wanted to call his attention to the matter that I had withdrawn that offer.

Q. Why didn't you tell him where the letter of July 5th was? A. He knew.

Q. But you testified that he told you in St. Louis that his address would be Bayfield, Wisconsin? A. Yes, sir.

Q. Why didn't you address it there? A. Because I must have had some information in the meantime telling me where his address was.

Q. Why can't you produce that letter giving this information? A. Because I haven't been able to find it.

Bowman left Ashland, Wisconsin, after sending the telegram of July 13th and went to Madison, Wisconsin, and thence to St. Paul, where he arrived on the evening of July 15th or morning of the 16th (pp. 230, 276). He was at St. Paul on July 16th, and left there on the next day for his camp by a new railroad which was being built from St. Paul toward his camp in the woods (p. 278). Before leaving Ashland on July 13th he sent word to Bayfield, which is about eighteen miles across the bay from Ashland, to send what letters were there to St. Paul (pp. 272, 276). On July 15th, 1882, Patrick, in answer to Bowman's telegram on July 13th, sent Bowman the following night telegram to Ashland, and a copy of it to St. Louis. (p. 262):

"Acceptance too late—proposition was dependent on immediate acceptance in St. Louis. See my letter of fifth."

This telegram reached Ashland and St. Louis on July 16th (p. 262). On that day Bowman was in St. Paul,

where he got the letters of June 27th and 28th, forwarded to him from Bayfield. On July 16th, at St. Paul, he wrote to Patrick the followihg (pp. 227, 228):

"When I came out of the woods I found your letter of June 22d waiting my answer. and I telegraphed you on same day accepting your proposition to surrender to you all my remaining interest in the property adjoining the A. Y. on you surrendering my note; and on a perusal of *yaur subsequent letters received here at St. Paul to-day I learn that is your wish;* I do not complain of it. My judgment differs from yours as to the course to pursue, and I should not stand in your way and will not; if you wish any papers signed, send and I will sign them. My address is Bayfield, Wis."

Patrick received the letter about July 20th. (p. 331.) He waited until August 2d before he answered it. (p. 516.) In the latter part of July the indications of mineral in the shaft were very encouraging. The indications of the nearness of the contact in which the mineral is found in quantity are iron pyrites appearing in the porphyry, and, particularly, the heavy iron stains in the porphyry, which come from the iron associated with the silver in the vein below. (pp. 474-5, 478, 535, 540, 544, 546-7-8.) In the latter part of July iron pyrites was encountered in the shaft, and the porphyry was also heavily iron stained. (pp.485-6, 520-1-2, 546-7-8). Whiting and others were then buying into the property on the indications that were being disclosed. (pp. 520-1-2, 546-7-8.) Patrick on July 31st, wrote to his brother James (But not to his partner Bowman): "The shaft in the Col. S. is about 215 feet, and *and is looking very encouraging.*" (pp. 436, 285.) Two days afterwards, on August 2d, Patrick wrote the following to Bowman (p. 516):

LEADVILLE, COLO., Aug. 2, 1882.

"MR. F. J. BOWMAN.

Dear Sir: Yours of the 16th ult. received; in accordance with your request therein I send the within paper for your signature. I sold the note in St. Louis before getting your reply, so will have to wait until it matures, which will be Sept. 19.—."

The paper inclosed in the letter of August 2d is in full, as follows (p. 294):

Memoranda of agreement, made and entered into this——day of ——, A. D. 1882, by and between Frank J. Bowman, of the City of St. Louis, State of Missouri, and William F. Patrick, of the City of Leadville, State of Colorado, Witnesseth: That whereas, said above named parties did, on the 17th day of February, A. D. 1882, enter into a certain contract in writing with Theodore C. Stebbins, Lyman Robinson, Saml. J. Glover and Harvey Howard, by the terms of which written contract the said Bowman & Patrick, in consideration of the conveyance to them by said Stebbins and others, above named, of the undivided one-half right, title and interest in and to the "Col. Sellers lode" and the Accident lode mining claims, agreed to sink a shaft upon one of said mining claims to pay mineral or limestone in place; and whereas, considerable work and development has been done and performed on said Col. Sellers lode, and the expense thereof has been borne principally by said Patrick, and said Bowman is unwilling to continue said work or pay any of the costs thereof; and whereas, on the 19th day of June, 1882, said Bowman executed and delivered to said Patrick his certain promissory note of that date for the sum of two hundred and eighty-eight dollars and seventy cents, due ninety days after date, and bearing interest at the rate of eight per cent. per annum, which note was for said Bowman's proportionate share of the cost and expenses of working said Col. Seller's lode, and which had theretofore been paid by said Patrick; and, whereas, said Patrick has negotiated and sold said note.

Now, therefore, it is hereby agreed by the parties hereto, that *if* said Patrick will pay said note when the same becomes due, and save the said Bowman from the payment of the same or any portion thereof, the said Bowman will release and surrender to said Patrick all his right, title and interest in and to the above described contract so made with said Stebbins and others to the property described therein

The said Bowman further agrees that on the payment of said note and the surrender of the same to him, to execute and deliver to said Patrick a good and sufficient deed of conveyance of his right, title and interest in and to the mining property described in said contract, and known as the "Col. Sellers" and "Accident" lode Mining Claims, situated in California Mining District, Lake County, Colorado, and the said Patrick agrees on his part to upon such conveyance to him to release said Bowman from any and all liability under said contract so made with said Stebbins *et al.*, and to save said Bowman from and all such liability.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

[Seal.]

W. F. PATRICK. [Seal.]

Witness as to Patrick: E. A. Reynolds.

On August 2d, although the indications were many and "very encouraging," a vein of mineral had not yet been struck. Though not probable, it was possible that the indications would prove delusive and mineral not be found. Patrick, therefore, arranged to have Bowman out, if it should prove to be a mine, and to have him in, if it should prove otherwise and there be only liabilities. In the above paper Patrick sent with his letter of August 2d he does not agree to pay the note, but says "*if* said Patrick will pay said note" then said Bowman will convey to him. By that clause Patrick was to have an option whether he would buy or not, but Bowman was to be bound if Patrick elected to pay the note. Bowman did not reply to that letter until August 28th, and decline to sign the paper sent him. (pp. 241-2.)

On August 13th a mineral vein was struck in the Col. Sellers shaft (pp. 68, 69). There was some controversy as to whether it was *pay* mineral, such as entitled Patrick and Bowman to the delivery of the deed, as provided in the contract for sinking the shaft; but this controversy was settled by a written agreement on August, 16, 1882, signed by Patrick and the other parties then in Leadville, in which it was recited that "a lode or vein is now believed by all to have been struck," and that the shaft was then 240 feet deep, and that sinking it ten feet further should entitle Patrick to receive the deed executed to him and Bowman as grantees then held in escrow. Patrick had sought to convince the parties present that he had or would acquire Bowman's interest, but they doubted his statement, and inserted in the agreement a clause of guaranty by Patrick to protect them from Bowman when he should discover what had happened. The agreement in full is as follows (p. 405):

This agreement, made and entered into this *16th day of August, 1882*, by and between Theodore C. Stebbins, Lyman Robison, of Leadville; Samuel J. Glover, Chicago; John Livezey, Jr., and Joseph C.

Whiting, of St. Louis; all of Leadville, Colorado, and Harvey Howard, of Webster, Ohio, parties of the one part, and William F. Patrick, of Leadville, of the other, and each and all being parties to this agreement interchangeably, and each and all agreeing the one with the other:

WITNESSETH: That whereas, heretofore and on the 17th day of February, 1882, the said Stebbins, Robison, Glover and Howard made an agreement with said Patrick and Frank J. Bowman, of St. Louis, and whereas, it is believed that said Bowman no longer has any interest in said contract, and said Patrick is willing to protect and hold harmless the said other parties off from any claim which may be made by said Bowman: And, whereas, the said Livezey and Whiting have become by purchase interested in the subject-matter of said contract, and have acquired their interest subject to its provisions: And, whereas, said contract related to the development of the Col. Sellers and Accident mining claims, situated in California Mining District, Lake County, Colorado, and thereunder a *shaft* has been sunk on said Col. Sellers' claim to the *present depth* of about *two hundred and forty feet:* And, whereas, since the commencement of said shaft, other parties have attempted to take possession of said Col. Sellers' claim and have been and are now engaged in sinking a shaft thereon, and disputes have arisen and will further spring up concerning the title to said property, and under the original and other agreements between all or some of the parties, it is left in doubt as to the person or parties liable for the expense, and disputes have arisen concerning the claims and obligations of the several claimants of the property which it is desired to adjust and determine: And, whereas, at the time of the execution of the original agreement, a deed to one-half of the property was executed and placed in escrow in the hands of C. C. Parsons, to be delivered upon the performance of a condition, and, whereas, there is considerable uncertainty as to when said condition may be deemed to have been complied with, and *a lode or vein is now by all believed to have been struck*, and it is desired to so far vary that condition or define it as to express the exact time when it shall be deemed to have been complied with; and whereas, certain other things provided for by said contract are still unfinished and unperformed, and it is desired that this agreement shall fully express the present and existing convention of the parties:

Now, therefore, in consideration of the premises, of one dollar by each to the other paid, it is agreed by and between the parties, that is to say: The said Patrick agrees to continue uninterruptedly, barring accidents to shaft or machinery, the sinking of the shaft now being worked on the Col. Sellers claim by him under the original contract until the same shall have reached *a depth* of not less than *two hundred and fifty feet*. He further agrees to continue prosecution of the application for a patent thereto, and to the Accident mining claim, and to pay all the costs, charges and expenses incident thereto, save the costs

and expenses of any litigation which may arise or grow out of or be incident to such application, and save, also, attorneys' fees which may be payable on account of or be incurred in and about said application or said suit, and as to such or any attorneys' fees which may be paid or which may accrue in the procurement or defense to the title of said claims, he agrees to pay such proportion as shall be equivalent of his interest in the property. He further agrees that *upon the delivery of the deed to him as hereinafter provided, to guarantee, save and hold harmless the said Stebbins, Robison. Howard and Glover, and Whiting, and Livezey*, of and from any and all costs and damages which may be claimed or recovered from each or all of said parties *by said Bowman by* reason of the delivery of said deed, and said other parties hereto other than said Patrick hereby agreeing: that *as soon as the shaft* now being sunk by said Patrick on the Col. Sellers' claim *shall have reached the depth of two hundred and fifty feet from* the surface, *to deliver or cause to be delivered to said Patrick the aforesaid deed for one-half interest* in and to the said mining claims which is now in escrow in the hands of C. C. Parsons, and they do jointly and severally agree that the sinking of said shaft to the depth aforesaid shall be, and be taken to be such a full performance of this and the original contract as that said Patrick shall be entitled to receive his deed.

Said Patrick further agrees that from this time, to-wit: the delivery of the deed they, and each of them will pay his and their proportion to all the costs and expenses, including attorney's fees of any and all controversies, suits or actions which may arise, be brought or defended for and on account of either of said claims and the title thereto, including any and all fees for attorneys, whether for suits or consultations or any sort of legal work, the proportion above refund being the equivalent of the proportionate interest, which each may own in the property at the time the expenses are or may be incurred or paid. In other words, it is agreed by all the parties hereunto that each shall pay his proportionate share of the expenses of maintaining and defending the title, and to the property such proportion to be determined and measured by his interest therein. It is further agreed between the parties hereto that the original agreement as to the machinery and shaft houses erected or to be placed or erected on said property shall be and remain in force. It is agreed between the parties that for the purpose of this agreement and determination of the amount which he, Patrick, is to pay hereunder, the said interest shall be taken, seven-sixteenths, and to include the interest

formerly held by Bowman, less the one-sixteenth heretofore transferred to said Livezey.

In witness whereof the parties hereto have hereunto set their names, this *15 day of August, 1882.*

In the presence of

LYMAN ROBINSON, [seal].
SAMUEL J. GLOVER, [seal].
By Geo. N. Simmons, Att'y in fact.
JNO. LIVEZEY, JR., [seal].
J. C. WHITING, [seal].
THEODORE C. STEBBINS, [seal].
W. F. PATRICK, [seal].

Patrick never communicated a word of the discovery made on August 13th and its results to Bowman, but on the contrary immediately took measures to prevent the information from getting to Bowman through any other source (pp. 377-8). James Patrick, particularly, not having a reputation in the family for reticence, was in August 1882, cautioned in various letters from his father and others to keep the discovery of the mineral from becoming known to Bowman (pp. 425 to 435).

About the 22d of August, 1882, the deed was delivered to Patrick (pp. 70, 406, 380).

On the 30th of August at the depth of 265 feet the shaft of the Col. Sellers entered a large body of ore, and the water coming in further progress was for the time stopped (pp. 70, 481). Patrick, not having received from Bowman any response to the letter and paper sent him on August 2d, left Leadville on the evening of August 30th, after the shaft had entered the ore body and came direct to St. Louis to see Bowman (p. 348). Patrick, on his arrival at St. Louis, on September 2d, found that Bowman had not returned from Wisconsin, and he then wrote to him, requesting the signing of the paper sent on August 2d, and concealing from him the discovery of mineral the contract of August 16th and delivery of the deed, and using a phrase that would lead him to believe

that mineral had not been found and was still being sought for. His language is as follows (p. 263):

"*I reached here this morning and hoped to find you.* * * * I sent you from Leadville an agreement concerning the Col. Sellers, in which I agreed to pay that note, $288.70, and you relinquished all rights under the agreement. *The shaft is still going down.* The note will be due about Sept. 19, *so please sign the agreement if you have not already done so, and send to me as soon as possible, so that I may arrange to take up the note.*

"My address for two or three weeks will be Knoxville, Tennessee."

On August 28th, at his camp on Brule river, Wisconsin, Bowman replied to Patrick's letter of August 2d (pp. 337-8). He declined to sign the paper Patrick sent him, and drew up another differing in several important particulars from the one Patrick sent him (pp. 241-2, 294, 338.) He noticed the clause containing the "if" whereby Patrick would have had an option to buy or not, while he would be bound to convey if Patrick paid the note. The "if" and the option thereby created were left out of the paper prepared by Bowman. He signed the paper prepared by himself on August 28, 1882, and mailed it to Patrick at Leadville, but Patrick, having left there previous to its arrival, it was forwarded to him at Knoxville, Tenn., where he received it on September 7, 1882 (pp. 337-8). The letter and paper are as follows:

Camp near Brule River, Aug. 28, 1882.

MR. WM. F. PATRICK.—*My Dear Sir:* I send you the contract you desire, and trust this will settle our matters pleasantly and amicably. I have inserted a clause concerning your brother's interest, but he may not care to retain it. My address will be St. Paul until Sept. 10th, then I shall return to St. Louis and business. Yours truly,

FRANK J. BOWMAN.

P. S. Mails are slow here.

"Memorandum and agreement made and entered into this day of , A. D. 1882, by and between Frank J. Bowman, of the City of St. Louis, State of Missouri, and Wm. F. Patrick, of the City of Leadville. State of Colorado. WITNESSETH: That whereas, said above named parties did, on the 17th day of February, A. D. 1882, enter into a certain contract in writing with Theodore C. Stebbins, Lyman Robison, Samuel J. Glover and Harvey Howard, by the terms of which written

contract the said Bowman and Patrick, in consideration of the conveyance to them by said Stebbins and others above named, of the undivided one-half right, title and interest in and to the 'Col. Sellers' lode and the 'Accident' lode mining claims, agreed to sink a shaft upon one of said mining claims to pay mineral or limestone in place; and, whereas, considerable work and development has been done and performed on said 'Col. Sellers' lode, and the expense thereof has been borne principally by said Patrick, and said Bowman has been and is unwilling to continue said work in such manner as said Patrick desires, or to pay any of the cost thereof if continued in such manner as said Patrick has directed; and, whereas, on the 19th day of June, 1882, said Bowman executed and delivered to said Patrick his certain promissory note of that date for the sum of two hundred and eighty-eight dollars and seventy cents, due ninety days after date, and bearing interest at the rate of eight per cent. per annum, which note was for the full amount of said Bowman's proportionate share of the costs and expenses of working said 'Col. Sellers' lode, which then remained due and unpaid, all previous amounts having been fully paid by him; and, whereas, said Patrick has negotiated and sold said note:

"Now, therefore, it is hereby agreed by the parties hereto that said Patrick will pay said note when the same becomes due and payable, and save the said Bowman from the payment of the same or any portion thereof, and in consideration thereof the said Bowman will release and surrender to said Patrick all his remaining interest in and to the above described contract, so made with said Stebbins and others, and to the property described therein (reserving and excepting, for the use of the brother of said Patrick, a one-sixth interest in said contract, if he shall elect to pay his assessments thereon).

"The said Bowman further agrees that, on the payment of said note and the surrender of the same to him, to execute and deliver to said Patrick a good and sufficient deed of conveyance of his right, title and interest in and to the mining properry described in said contract, and known as the 'Col. Sellers' and 'Accident' lodes, mining claims situated in California Mining District, Lake county, Colorado; and the said Patrick agrees, on his part, upon such conveyance to him, to release said Bowman from any and all liability under said contract, so made with said Stebbins *et al.*, and to save said Bowman from any and all such liability. Witness, our hands and seals, this 28th day of August, 1882. FRANK J. BOWMAN.

Patrick did not reply to the above, and there was no further correspondence between him and Bowman (pp. 339-340-1).

On October 19, 1882, Bowman, having returned to St. Louis, James Patrick, according to Bowman's recollection,

and both of the Patricks, according to their statements, appeared in Bowman's office in relation to the matter pp. 160-1, 339, 414). Bowman states that James Patrick said that he had called in behalf of his brother to get Bowman to execute the deed for his interest in the Col. Sellers to his brother. Bowman says that he then asked James if his brother had discovered any mineral, and that James replied that none had been discovered (pp 160-1). Bowman then talked with James concerning the interest of James in the contract and as to what disposition was to be made of it. James then signed and gave to Bowman the following order (pp. 111, 160):

"ST. LOUIS. Oct. 19, 1882.

"MR. FRANK J. BOWMAN.

"Dear Sir: Please to convey the entire one-fourth interest held by you in your name (two-thirds for yourself and one-third for me) in the Col. Sellers and Accident mines near Leadville, Colorado, to my brother, William F. Patrick, with whom I will arrange as to my interest. Respectfully, JAS. M. PATRICK."

James and W. F. Patrick testify that they were both present in Bowman's office on October 19, 1882, and that they talked over the matter of Bowman's relations to James in regard to an interest in the contract, and that W. F. Patrick then agreed to take the conveyance of the entire interest standing in Bowman's name, and to assume Bowman's liability to advance James' share of the expenses (pp. 340, 414). This matter being settled, Bowman acknowledged and delivered his deed the next day (p. 341). Each of the Patricks testify that in none of their interviews did Bowman make an inquiry of them as to whether or not mineral had been discovered in the Col. Sellers shaft, and that they never mentioned the matter to him (pp. 340, 341, 377, 416, 417). A few days after October 19th James Patrick was betting that his brother and himself would take out at least $8,000 from sales of ore within a year from their interest in the Col. Sellers (p. 118), and

W. F. Patrick, writing back from Leadville on October 29, 1882, to James, stated that he had refused $3,000 for a one-sixteenth interest since his return, and that with the water under control there was no question but that they could take out not only $8,000 but $80,000 within a year (p. 252).

James Patrick testified that several months after October 19, 1882, he met Bowman and told him that the mine was looking well and that he was sorry for Bowman's sake but glad for his brother's sake that Bowman had sold out to his brother, and that Bowman replied that he was more than satisfied with the agreement and to express his congratulations to his brother (pp. 417, 433). Some time after this, when Wilson told Bowman what large dividends the mine was paying, Bowman again expressed his gratification that Patrick was so fortunate (p. 527). Bowman believed and trusted in Patrick; suspecting no wrong he made no complaint. Then came the family controversy in which the Patricks were engaged in October, 1886 (p. 93), in which were then brought to light various letters written by the Patricks to each other relating to the Col. Sellers and other mining deals, and among which were several written in August, 1882, showing that mineral was discovered in August, 1882, in the Col. Sellers shaft, and that they were then suppressing the information to prevent it from reaching Bowman, so that they could get his interest in the mine (pp. 135, 251, 425-6, 435, 377-8). These letters were shown to Bowman (pp. 161-2). Their revelations astonished him. He brought suit at once, and the disclosures since made by the testimony taken in this case show that he was not even then informed of all the kinds of deceit which his partners had practiced upon him.

The mine, after paying from its product for all improvements, machinery and expenses of operating it, paid in dividends up to the time the depositions were taken in November, 1887, the sum of $434,065.87 (pp. 52, 395),

and has paid others since; and Patrick, in a paper signed and sworn to by him in Leadville on April 10, 1886, stated that the Col. Sellers was then worth $1,000,000 (p. 288).

Patrick has received all the dividends on the interest he obtained from Bowman (pp. 54, 395).

V.

Referring now to the salient features of the acts and correspondence of Bowman and Patrick, of which a full outline has been given, it is apparent that there was never a time on or after July 5th, 1882, that Patrick wished to get money from Bowman. On that day he wrote to his brother James: "*The shaft in the Col. Sellers is looking very promising; for several feet the porphyry has been heavily iron-stained, and I have good reasons for thinking we are near the contact.*" His only thought then and after that was to get the property and not the money from Bowman. He knew as he stated in his letter to his brother James, on March 12, 1882 (p. 250), that "*if we get any ore there we are almost sure of a big body, and a mine worth at least $100,000. The A. Y. mine, adjoining this property, is shipping eighty or ninety tons per day, and, I am told, is clearing about $20,000 to $25,000 per month.*"

Patrick knew, on June 19, 1882, that Bowman was about to leave St. Louis for the summer months, and he then received his post-office address and agreed to wait on him for payments. Soon afterwards, only sixteen days, when the indications appeared in the shaft showing that it was over an ore body, he desired to get Bowman's share of the mine, and not the money due from him, and he violated his agreement to wait on him, and made a peremptory demand, not to get the money, but as a necessary preliminary in the scheme to forfeit his interest, and for fear that this sudden outbreak on his part and violation of his agreement to wait would arouse suspicion on Bowman's part

and cause him to make arrangements for immediate payment, he sent the letter and draft to a different address from the one Bowman had just given him, and directed the draft to be returned without protest, for fear that the bank would find Bowman and thus bring the matter to his attention. At the same time he wrote to his brother that his interest would be preserved, thus keeping him quiet so that he would not inform Bowman of the intended acquisition of Bowman's interest. He said to his brother:

"*The shaft in the Col. Sellers is looking very promising; for several feet the prophyry has been heaily iron stained, and I have good reasons for thinking that we are near the contact.* Acting on Col. Bissell's advice, I to-day wrote to Bowman *telling him* that if he did not pay up, I would apply to the owners of the ground for a new contract in my own name, and leave him out. *I don't suppose he will pay, but I will let you into the new one on the same terms you are in the old.*"

Knowing that Bowman's address was not St. Paul he, on the next day, July 6th, drew a draft on Bowman and sent it to a bank at St. Paul, directing that no protest be made (pp. 362-3), and had the draft immediately returned (p. 327). He had now used the post-office and the bank, and thereby had made a certain kind of record, so that if Bowman should call him to account he could use it in trying to prove his good faith. But events soon occurred which disarranged the evidence that Patrick was preparing. Bowman, on July 13, 1882, telegraphed from Ashland, Wisconsin, in answer to Patrick's letter of June 22d (pp. 329-362-3-4-5). This showed that he was not at St. Paul, and had not got the letter of July 5th. Patrick on July 15th, telegraphed back in answer to Bowman's dispatch, and added "see my letter of July 5th," but did not tell him where it was (pp. 262-364). On July 16th Bowman arrived at St. Paul and wrote to Patrick. Now if that letter of July 5th had not been returned to Patrick there would have been some mention of it in Bowman's letter of July 16th. In that letter Bowman wrote as follows (pp. 228-365).

"When I came out of the woods I found your letter of June 22d awaiting my answer and I telegraphed you same day accepting your proposition to surrender to you all my remaining interest in the property adjoining the A. Y. on your surrendering my note, and on perusal of *your subsequent letters received here at St. Paul to-day I learn that is your wish.* I do not complain of it. My judgment differs from yours as to the course to pursue, and I should not stand in your way and will not. If you wish any papers signed, send, and I will sign them. *My address is Bayfield, Wisconsin.*"

The subsequent letters referred to by Bowman in the above letter, as received at St. Paul, are, as is shown by their contents, the letters of June 27th and June 28th, forwarded from Bayfield to St. Paul (pp. 272, 276), for each of them repeats the wish of Patrick as expressed in his letter of June 22d, and mentioned in Bowman's letter of July 16th (pp. 276, 293, 228), whereas the concluding clause of Patrick's letter of July 5th is (p. 325): "I withdraw my offer to return your note for $288.70, dated June 19, 1882, in case you assign your interest in the contract to me."

Patrick was now apprised, even if he had been previously acting in good faith, and if the letter of July 5 had contained information of the indications of the nearness of mineral, that Bowman had not received it, and if Patrick intended that Bowman should get information of the indications of the nearness of mineral he would then have written it to him again. He did not do so (pp. 364, 365).

And if Bowman had received the letter of July 5th and had immediately thereafter parted with his interest before any of the subsequent discoveries were made, he would have been entitled to have the ~~suit~~ sale set aside, for not only was Patrick then concealing from him the existence of the indemnity contract of March 27th, 1882, but also the note for $394.85, the amount of which he included in the sum he demanded of Bowman in the letter of July 5th, and in the draft he next day drew on him. In the statement of account claimed by Patrick to have been en-

closed in and referred to in that letter is the item "June 28, extra work, blowing up shaft, $394.85" (pp. 326-7). Patrick then held the note of Stebbins and Robison for that $394.85, payable to himself, individually, which they gave him the latter part of May, 1882, and which he concealed from both Bowman and Livezey. He had no right to peremptorily demand in that letter of July 5th that Bowman should forthwith pay his and James Patrick's share of that $394.85 under penalty of forfeiture of his interest in the property, without telling Bowman at the same time the true state of that item, that though then payable, there was a note held by him, by which the amount was to be repaid.

There are strong reasons for believing that the alleged copy of the letter of July 5th is not the same as the letter mailed to St. Paul, and which probably was returned to Leadville, as Patrick testifies that the copy he introduced in evidence was not a letter press copy, and that he had no copies of his other letters (pp. 366-7). These further facts appear: In Patrick's *original* sworn answer in this case (p. 11), he states that "*on the 19th day of June*, 1882, the defendant Wm. F. Patrick *had expended* for the sinking of the shaft upon the Col. Sellers' lode and for other expenses attending the performance of said contract the sum of $1474.46," and that he and Bowman had a settlement that day. In his *amended* answer (p. 16), he says: "on or about the *20th day of May, 1882*, the defendant, Wm. F. Patrick, *had expended*, for the sinking of the shaft upon Col. Sellers' lode and for other expenses attending the performance of said contract, the sum of $1474.-50," and that he and Bowman had a settlement on June 19, 1882. Defendant introduced in evidence the alleged copy of letter of July 5th, and the statement of account therein referred to, *at different times*. The copy of letter was first introduced in evidence on May 13, 1887 (pp. 237, 244), when the *original* answer was on file, and the copy of

statement of account was first introduced in evidence on November 21, 1887 (pp. 295, 326, 366), when the *amended* answer was on file. The peculiar thing is that the alleged copy of the letter agrees with the *original* answer, and the copy of the statement of account agrees with the *amended* answer and differ from each other in one important matter, which would not have been the case if the alleged copy of the letter had been a true copy of the letter, based on and referring to the statement of account inclosed with it. In this statement of account, written by Patrick (p. 326), are the items of payments made by him from May 22, to July 1st, 1882, including those since alleged by him to have been omitted from the settlement of June 19th, 1882. The items paid prior to June 19th (the day of settlement) are nine in number, and aggregate $579.75. How could Patrick on July 5, 1882, with the statement of account he had just written out to inclose in the letter, with all the items written by him as paid by him *before* June 19th (the day of settlement), staring him in the face, use this language in the letter, "I send you statement of all amounts *paid* on the Col. Sellers *since* our settlement." From the very statement of account he had just written and then before him, and from his own knowledge, nine of the items as he since claims had been paid *before* the settlement, and there is every probability that the original letter, if it referred to the items at all, had some such phrase as, "I send you statement of the amounts paid before our settlement and not included in it, and also the amounts paid since our settlement." The error made in the original answer is copied into this alleged copy of a letter which makes its appearance while that pleading is on file, and when the error in the pleading is corrected and the statement of account is brought to light, it flatly contradicts the language of what is said to be a copy of the letter based upon, referring to, and inclosing it. It is hardly probable that the original letter was thus in conflict with both the fact and

the written detailed statement of the fact, then made by the same writer and inclosed with it.

The letter really written on July 5th is described in the letter of same date from W. F. Patrick to his brother James (p. 250). After telling his brother of the indications which had just appeared in the shaft, he says: "I to-day wrote to Bowman *telling him* that if he did not pay up I would apply to the owners of the ground for a new contract in my own name." That is a contemporaneous statement of the contents of the letter made by its writer. He does not say, "I to-day wrote to Bowman *telling him* of the indications revealed in the shaft," but uses in place of it language which shows that he gave Bowman no information tending to expedite payment. "I don't suppose he will pay," and then adds the following so that James would feel safe and not interfere in behalf of his friend Bowman: "but I will let you into the new one on the same terms you were in the old."

But aside from the questions as to whether the letter of July 5th was returned to Patrick, and whether the copy written and put in evidence by him is the same as the original, the evidence clearly shows that even if it was not returned it did not reach Bowman, and that Patrick, in July, 1882, was aware of that fact and never tried to put Bowman in possession of the information he alleges it contained, by writing it again to Bowman at the address given him by Bowman in St Louis on June 19th, and repeated to him in Bowman's letter of July 16th (pp. 364, 365).

For the sake of the argument, it could be admitted that Bowman at some time received the letter of July 5th, and that the copy put in evidence is the same as the original. It would then appear that Patrick had caused it to be disregarded. Not only did Patrick keep silent as to the disclosures in the shaft in the last week of July, and the discovery of the vein on August 13th, but by his letter of September 2d, written after the shaft had entered

a body of mineral and he had received the deed to himself and Bowman, he stated to Bowman that "the shaft on the Col. Sellers *is still going down*" (p. 263). If Bowman had received the letter of July 5th, this concealment and misrepresentation by Patrick would have made him believe that the indications of mineral mentioned, in the letter of July 5th, had proved delusive, and that mineral was still being sought for, whereas they had proved true, and mineral had already been discovered.

VI.

Wm. F. Patrick, knowing that Bowman had about the time of the bringing of this suit, come into possession of letters written in 1882, by Patrick's father and mother to James M. Patrick relating to discoveries of ore in the Col. Sellers in the summer of 1882, but not knowing their contents and fearing to confront them, admitted that in August, 1882, he took measures to prevent any member of the Patrick family from letting information of the discoveries of ore get to Bowman (pp. 377–8).

Besides the letters heretofore mentioned which James received from his brother Wm. F. on July 5th, 1882, and July 31, 1882, giving information of the indications of mineral, and very encouraging appearance of the material then being found in the shaft he, in August, 1882, received two letters, one from his father and one from his mother, mentioning the discoveries made about the middle of August, 1882, the letter from his father cautioning him to keep the information from getting to Bowman (pp. 427, 433-4).

When James M. Patrick was on the witness stand in this case testifying in behalf of his brother he was thus questioned on cross-examination as to the information he had received through those letters (p. 434).

"Q. Then if you did get this letter prior to October 19th, 1882, when you met Mr. Bowman you told him, did

you not, that ore had been discovered in the Col. Sellers shaft, and you were requested not to tell him anything about it?

Objected to as immaterial, irrelevant and incompetent.

A. I don't think that I would have told Mr. Bowman that kind of a statement or remark, I am sure.

Q. Why so? A. Because I would be very foolish; that would be a very foolish statement to make.

Q. In what respect would it have been foolish? A. It would be a statement that a child might make, nobody else.

Q. That is, you would look upon it as foolish to communicate such a thing, but how would you look upon it in regard to dishonesty?

Objected to as immaterial and irrelevant.

A. I do not know that the question of honesty would have anything to do with it: it is a matter of business policy."

James owed his good fortune of being an owner in the property to Bowman. From the letter of W. F. Patrick to James March 12th, 1882 (p. 249), it appears that William declined to let James have an interest in the contract unless James would make use of his brother-in-law, Ward McManus, and induce him to pay all the expenses of sinking the shaft for one-fourth interest in the contract. James failed to get in that way, and being excluded by his brother, turned to Bowman. Bowman treated him generously, let him have one-third of his interest without any increase in price, and on James' representation to him that it would be inconvenient to pay his assessments, Bowman agreed to carry them for him for one year and without security (p. 215). Bowman thus parted with the benefit and retained the burden. James was under both the legal obligation of a partner and the moral obligation of gratitude to be faithful

to Bowman. His record as a partner and the beneficiary member of a friendship has been made—it is one of treachery and ingratitude. Even at the very time, in August, 1882, when he was withholding information from Bowman of the discovery of mineral described in the letter to him of August 17, 1882 (p. 427), and the information in the letter of July 31, 1882 (p. 285), Bowman, on August 28th, was refusing to sign the proposition sent him by Wm. F. Patrick, which, besides other objectionable things, ignored the interest of James, and then prepared another which, in addition to other changes from the proposition sent him, contained a clause defining and protecting the interest of James.

If Wm. F. Patrick had been guilty of no other fraud in this case but the closing of James' mouth to prevent information from reaching Bowman until he could get Bowman's interest, that alone would be sufficient to cause a decree for the recovery of the interest so acquired. Bowman had done nothing to forfeit his right to a full disclosure from James Patrick, and the preventing of these disclosures was of itself an actual fraud, which calls for remedy, entirely independent of Wm. F. Patrick's liability for his own fraudulent silence and other active fraud.

VII.

In the original answer of Patrick filed in this case, he alleged that the negotiations between him and Bowman for the purchase of Bowman's interest continued until August 28th, 1882, when Bowman mailed to him the paper of that date, and that when he received it he accepted it (p. 13). As soon as the depositions of Gerhard and Whiting were taken disclosing that various indications of the nearness of mineral appeared in the shaft in the last week of July, 1882, and that a "mineral chute" or "strong feeder of ore" was struck on August 13th, 1882, Patrick perceived that his admission that there was no contract of sale, until

he had accepted Bowman's proposition of August 28th, would cause a decree against him. Under stress of his necessities he then shifted his position, attempted to evade his admission under oath, and in his amended answer alleged that a contract of sale was made by Bowman accepting in letter of July 16th his proposition in letter of June 22d (p. 17). In his testimony, he tried to make it appear that Bowman made him a proposition in the letter of July 16th, and that he accepted it about July 23d (pp. 332, 469).

Patrick received Bowman's letter of July 16th, 1882, about July 20th (p. 331). He did not answer it until August 2d. (pp. 515–16). In the last week of July the indications of the near approach to mineral were very encouraging (pp. 485–6, 520–1–2, 546–7–8). They gave a speculative value to the mine, and Whiting and others were purchasing interests on the indications then being disclosed in the shaft (pp. 520–1–2, 546–7–8). W. F. Patrick who was an assayer and knew what mineral was (p. 347); who had several years' experience as a miner (p. 347); and who is described by James Patrick as very conservative in his language, and prone to understate things even to his brother (p. 442), on July 31st, 1882, wrote to his brother James, "the shaft in the Col. S. is about 215 feet, and is looking *very encouraging*" (pp. 285, 436). He should then have written the same to his partner Bowman, but he did not.

From that letter of August 2d, 1882, it appeared not only that Bowman's letter of July 16th was not answered by Patrick until August 2 (after the last week in July), but that it did not profess to accept anything in Bowman's letter of July 16th, and the undated paper it inclosed contained terms and conditions different from those mentioned in Bowman's letter of July 16th. There is no proposition in Bowman's letter of July 16th to sell *to Patrick*, for the letter is in answer to a letter of June 22d (p. 262) which

is not a proposition from Patrick to buy, but a statement that some *third party* was to be induced to buy, and even that proposition was withdrawn by Patrick's telegram of July 15th (pp. 262-3) to Bowman, and the *third party* never did agree to buy. If the correspondence had ended with Bowman's letter of July 16th, and he had sued Patrick for damages for breach of contract and produced Patrick's letters of June 22d, 27th and 28th, as proof that Patrick had proposed to buy, he would have disproved his own case for each of them refer to some third party (pp. 262, 276, 293).

"In making a contract *parties* are as important an element as the terms with reference to the subject-matter—mutual assent as to both is alike necessary."

Nat. Bank v. Hall, 101 U. S. 43.

But even if Bowman had made a proposition in his letter of July 16th to sell to Patrick, then Patrick would not have had the right to keep the matter in abeyance and await developments thereafter to be made in the shaft and if anything was afterwards discovered bearing upon the value, to then accept the proposition previously made, for his duty to his partner required him to first disclose the new facts. Therefore, if Patrick had unconditionally accepted after July 31st, any proposition, even if made to him in Bowman's letter of July 16th, the sale could not stand, because of his concealment from Bowman of the very encouraging indications appearing in the shaft in the last week of July, to say nothing of his concealment of the indemnity contract of March 27th and the note for $394.85. It cannot be maintained that Patrick had a right to conceal the indications revealed in the shaft, on the assumption that the negotiations would end in a contract. If such a rule existed it would be a very easy matter for the resident partner in a mining operation to legally fleece the absent partner. All he would have to do would be to start

negotiations to buy when he thought he was near the finding of mineral, keep them pending by various changes in the correspondence, until the disclosures in the shaft convinced him whether he wished to buy or not. If the disclosures were certainly good, conceal them and have a binding contract made; if they were unfavorable, decline to enter into a binding contract, or, if only favorable but not certain, still conceal them and seek to obtain a contract binding the absent partner to sell, but giving the resident party the option to buy or not, according to whether or not the indications should prove correct or incorrect.

It is also apparent that even if there had been a proposition in Bowman's letter of July 16th to sell to Patrick, it was not accepted by Patrick's letter of August 2d, 1882, or by the paper therein contained. The letter merely says: "Yours of 16th ult. *received*. In accordance with your request therein I send the within paper for your signature" (p. 516).

The letter does not say that any proposition was *accepted*, and when the inclosed paper is examined it is found to be wholly different from anything mentioned in any of the previous letters (p. 294)—new terms were introduced. Patrick, in that paper, did not agree to pay the note and take the property. He left himself free to buy or not, but sought to bind Bowman to sell, if he elected to buy. "*If* said Patrick will pay said note," then Bowman was to convey, is not an agreement by Patrick to pay said note and take the property. This paper sent by Patrick to Bowman on August 2d, 1882, was a mere proposition to Bowman. It was an attempt by Patrick to get an option on Bowman's interest. The law is plain in regard to contracts made by letter.

"Though there is an acceptance, if it is not to the exact thing offered, or if it is accompanied by any conditions or reservations, however slight, in time or otherwise, no contract is made. It is so, for example, where new

terms are introduced; they constitute an offer on the other side and leave the question open."

Bishop on Contracts (2d Ed.), Sec. 323.

"A proposal to accept or an acceptance upon terms varying from those offered is a rejection of the offer." Minneapolis Ry. *v.* Columbia Rolling Mill, 119 U. S. 151.

Bowman did not answer the letter of August 2d until August 28th, and he declined to sign the paper inclosed in the letter of August 2d. Patrick did not write to Bowman again until September 2d. On August 13, 1882, a mineral vein was struck in the Col. Sellers shaft at a depth of about 240 feet (pp. 68, 69, 405-6). There was some controversy as to whether or not it was *pay* mineral, such as entitled Patrick and Bowman to receive the deed, as provided in their contract for sinking the shaft. This difference of opinion was settled by a written agreement on August 16, 1882 (pp. 405-6), signed by Patrick, Robison and others, then present in Leadville, in which it was recited, that "a lode or vein is now by all believed to have been struck," and that the shaft was then 240 feet deep, and that the sinking of it ten feet deeper should be held to be a compliance with the terms of the Bowman and Patrick contract of February 17, 1882, to sink the shaft and entitle Patrick to receive the deed. Patrick testified that the deed was not delivered to him until the last of October or first of November, 1882 (pp. 351-2). It is nevertheless plain that the deed was delivered to Patrick about August 22, 1882. Whiting says it was in August, 1882 (p. 70). The agreement of August 16th provided that it should be delivered when the shaft was 250 feet deep. It was then 240 feet deep (p. 406). Patrick says that he left Leadville on August 30, 1882 (p. 348). The shaft was then 265 feet deep (p. 481). In his testimony relating to another matter when he was reading from his letter to his wife, written on August 21, 1882, this admission

slipped out, "I am going up to the Col. Sellers this afternoon to measure the shaft, and if it is as deep as they claim—meaning the contractors there—*I will get my deed to-morrow morning*" (p. 380). Patrick kept the deed off the record until November 6, 1882 (pp. 265, 352). He never communicated a word to Bowman concerning the striking of the mineral vein on August 13th, of the contract of August 16th, and the delivery of the deed, but on the contrary took measures to prevent the information from getting to Bowman through any other source (pp. 377-8, 427,434). On August 30th, the shaft of the Col. Sellers, at a depth of about 265 feet entered an ore body (pp. 70, 481). Patrick had not yet received an answer from Bowman to his letter of August 2d and the inclosed paper; and on the evening of August 30th, after the shaft had entered the ore body, he left for St. Louis to see Bowman (p. 348). On his arrival at St. Louis on September 2d, he found that Bowman had not yet returned from Wisconsin, and he then, on September 2d, at St. Louis, wrote to Bowman asking him to sign the paper sent him on August 2d, and concealing from him the discovery of mineral, fulfillment of the contract and delivery of the deed, and using language which would make Bowman believe that mineral had not been found and was still being sought for. His language is: "*I reached here this morning and hoped to find you.*" * * * I sent you from Leadville an agreement concerning the Col. Sellers, in which I agree to pay that note $288.70, and you relinquish all rights under the agreements. *The shaft is still going down.* The note will be due about September 19th, *so, please sign the agreement*, if you have not already done so, and *send to me as soon as possible*, so that I may arrange to take up the note. My address for two or three weeks will be Knoxville, Tennessee" (p. 263).

Bowman, on August 28,1882, at his camp on the Brule river, Wisconsin, answered Patrick's letter and paper of

August 2d (pp. 337-8). He refused to sign the paper (pp. 241-2), and drew up another (pp. 294, 338) in which he left out the "if" and consequent option provided for in Patrick's proposition, and made another change, which was to insert a clause reserving for James Patrick the interest mentioned in agreement of March 25, 1882 (pp. 294, 338.) He signed the paper he thus prepared August 28th, and mailed it the same day to Patrick at Leadville, where it arrived after Patrick had left there. It was forwarded to him at Knoxville, Tenn., where he received it on September 7, 1882 (pp. 337-8). Patrick did not make any reply to Bowman's communication of August 28th, and there was no further correspondence between them (p. 339).

On October 19, 1882, Bowman then having returned to St. Louis, James Patrick, according to Bowman's recollection, and both of the Patricks, according to their statements, appeared in Bowman's office (pp. 160–1, 339, 414). Bowman says that James Patrick said he had called by request of his brother to get Bowman to execute a deed to his brother for Bowman's interest in the Col. Sellers; and that he asked James if any mineral had been discovered in the Col. Sellers, and James said that nothing had been found (pp. 160–1).

W. F. Patrick and James each testify that they were both present in Bowman's office on October 19th, and that the matter of James' interest in the property and Bowman's liability to advance for him were discussed, and that W. F. Patrick then agreed to take a conveyance of the entire interest standing in Bowman's name and assume Bowman's obligations to advance James' share of the expenses (pp. 340, 414). This matter then being settled, Bowman, on the next day, executed and delivered his deed to W. F. Patrick. Each of the Patricks testify that at no time did Bowman make any inquiry of them as to whether mineral had been found in the Col. Sellers shaft

and that they never said anything to him on the subject, (pp. 340–1, 377, 416, 417).

The uncontradicted evidence shows that Bowman's proposition, mailed to Patrick on August 28, was not accepted until October 19. The Patricks were partners of Bowman until that acceptance, and up to that moment the duty of full disclosure rested upon them. What they then knew and how closely they concealed it has already been shown. And so matters rested until the coming to light of the Patrick letters in October, 1886 (pp. 161–2), and the consequent bringing of this suit.

VIII.

Bowman got for his 5–48 of the mine $18.48 less than the assessment against that interest; that is, he was relieved of the assessment and lost $18.48. He lost the $264.23 money advanced by him for Patrick and included in settlement of June 19th, 1882 (p. 359) and collected the note for $245.75 given him by James for expenses assumed for James and included in settlement of June 19th, 1882 (pp. 410-11), thus making his net loss $18.48. A computation, based on Patrick's figures and statements is here made to show the value of 5–48 of the mine on July 28th and 31st, when the disclosures in the shaft were made on which Whiting and Gerhard bought (pp. 520–1–2, 546–7–8). The total expenses to that date did not exceed $6,500. $1,474.50 was the amount included in settlement of June 19th. The aggregate amount not included in the settlement of June 19th, up to and inclusive of July 1st, was $2,539.55 (p. 327). This amount of $2,539.55, as is shown by the itemized bill (p. 326), included all the preliminary expenses—surveying, hoisting engine, etc., and payment for 50 feet of the second 100 feet, and the lumber furnished by Havens & Beaman ($400) for timbering the second 100 feet. (The lumber for the first 100 feet having cost $374.50, (p. 318). The contract for sinking sec-

ond 100 feet was $1,900. This left $1,072.50 (1-2 of the $1,900 and 1-2 of 15 per cent. of $1,900) to be paid to finish the second 100 feet. On July 31st the shaft was 215 feet deep (p. 285). It is evident that it did not cost exceeding $500 to sink and timber this 15 feet; so that it appears that the total cost of sinking the shaft to 215 feet on July 31, 1882, was $1,474.50, plus $2,939.55 plus, $1,072.50 plus, $500, equals $5,986.55. It is thus shown that $6,500 is a very liberal estimate of the total cost to July 31st. Bowman's 5–48 would bear $1,354.16 of the amount. On July 28th, Gerhard & Whiting, on the strength of the disclosures made in the shaft in the last week of July, bought from Stebbins a non-assessable interest at the rate of $500 for 1-64, or $32,000 for the mine. At this rate 5-48 of the mine would be $3,333.33.

On August 16, 1882, the date of the contract (p.405), which followed the discovery of August 13th, and caused the delivery of the deed, the shaft was 240 feet deep (p. 405). That contract provided that after the shaft was sunk 10 feet further, all the interests should bear their *pro rata* share of the expenses. The shaft was then 25 feet deeper than on July 31st. To sink and timber the shaft for this 25 feet did not cost exceeding $1,500. This would make the total expense from the beginning to August 16, 1882, $8,000. Bowman's 5-48 of the mine would bear $1,666.66 of the amount. To sink and timber the shaft, the 10 feet further required by contract of August 16th would cost not exceeding $500, of which Bowman's 5-48 would bear $104.15, making the total expenses to that date $8,500 of which Bowman's 5-48 would bear $1,770.80. This was on August 22, 1882 (p. 380), when the deed was delivered, and thereafter the Bowman and Patrick interest bore only its *pro rata* part of the expenses.

Whiting and Gerhard, after August 16th and before September 23, 1882, the date of the deed to them, contracted through a correspondence between them in Lead-

ville and Harvey Howard in Ohio, to buy his 1-32 interest in the Col. Sellers alone (not including the Accident) for $1,500 (Whiting's disposition, answer to 4th cross-interrogatory p. 80). This was at the rate of $48,000 for the Sellers mine alone—5-48 of the Sellers alone would be $5,000. The total assessments to August 22d on 5-48 of both Accident and Sellers was $1,770.80. The shaft was then sunk 15 feet further, or to a total depth of 265 feet, when it entered the great ore body on August 30, 1882 (pp. 70, 481). To sink and timber this 15 feet did not cost exceeding $750, of which Bowman's 5-48 would bear $78.13, which would make the total cost to August 30, 1882, at a depth of 265 feet, $9,250, of which Bowman's 5-48 bore $1,848.93. Patrick says (p. 345) that the total was $1,464.50, plus $7,639.43, equals $9,103.93, which shows that $9,250, the estimate, exceeded the actual cost. While Patrick was away from Leadville from August 30th to about October 24, 1882, some indebtedness for pumps and handling the water was incurred. His share of this was $1,011.45 (p. 345). Under the contract of August 16, 1882, this $1,011.45 was 7-16 of the total indebtedness, which is thus shown to be $2,333.33. Bowman's 5-48 bore $243 of the amount. The total expenses borne by Bowman's 5-48 to August 30th were $1,848.93, and adding the $243, makes the total expenses on the 5-48 to date of Patrick's return about October 24th $2,091.93.

The falsity of Patrick's statement to Whiting (p. 86), that when about the date of the contract of August 16, 1882, he offered Bowman's 5-48 to Whiting, the expenses borne by that 5-48 were about $2,300 has now been made apparent by computation from his own figures. The expenses on it as above shown were then but $1,666.65. He offered it to Whiting at about the date of that contract, August 16, 1882, for $2,300. Whiting evidently suspected a fraud and wanted nothing to do with it at any price, for

in that very contract he made Patrick include an indemnity clause protecting the other parties from any suit that Bowman might bring, because of Patrick's conduct. (pp 406). If Patrick was not then trying to manufacture evidence but really wished to sell 5-48 of the mine for $2,300, why did he not offer 5-48 of his own, about which there was no question, instead of Bowman's 5-48. It was about this time, August 16th, that he was urging the members of the Patrick family to caution James to keep quiet for fear, as he says, that if Bowman shoud find out about the discoveries he would not transfer his interest to Patrick (pp. 377-8).

All the sales made after the disclosures in the last week of July and during August and September were at a rate more than double the expenditures that had been made on the 5-48 at the date of the sales, and on October 29th, just ten days after Patrick got Bowman's deed, the ore still being under water as it was on August 30th, he wrote from Leadville to his brother that he had been offered $3,000 for 1-16, and that with the water under control they could take out of the mine on their interest within a year not only $8,000 but $80,000 (p. 252).

IX.

It was claimed in behalf of Patrick by his counsel in the court below that Patrick had the right to remain silent because Bowman was despondent and dilatory in payment. It will be seen that there is no foundation in this case upon which to rest such a claim. But suppose that Patrick for any reason had a right to remain silent as to the disclosures in the shaft, he had no right to be active in preventing Bowman from getting information from other sources, nor to act in a way to induce Bowman not to inquire. If for any reason his fiduciary obligation to communicate to Bowman had ceased, it left him only the right to remain silent. The law upon this subject is thus stated by *Pomeroy in Eq. Jur., Sec. 901:* "It is only *silence* which is permitted.

If in addition to the party's silence there is any statement, even any word or act on his part which tends affirmatively to a suppression of the truth, to a covering up or disguising the truth, or to a withdrawal or distraction of the other party's attention or observation from the real facts, then the line is overstepped and the concealment becomes fraudulent. The maxim is, *aliud est celare, aliud tacere.*" Patrick took measures in August to prevent James from letting the information of previous discoveries get to Bowman, and on September 2d, when he knew the shaft was in an ore body, he, to cause Bowman to believe that nothing had been found and prevent him from making any inquiry, wrote him that the shaft was "still going down."

But Patrick had not even the right to remain silent. The reason advanced for his not giving Bowman information of the disclosures made in the shaft, is that Bowman was despondent because of the costs and expenses of the litigation, and was slow to pay and inclined to get out of the contract, The statement in Patrick's sworn answer is that this litigation involved "a large expense to *plaintiff* and defendant Wm. F. Patrick, in protecting and defending the title to the Col. Sellers and Accident mines." (p. 12); and this same sworn answer says that on June 19, 1882, "*plaintiff complained* of the expense attending the development of said property *and the costs of the litigation aforesaid and expressed a desire to be relieved of the same*" (p. 12). On that day, June 19th, when Patrick and Bowman were in St. Louis together, just prior to Bowman's departure for the summer, Patrick heard those complaints and let Bowman go away in a despondent frame of mind, while he (Patrick) had in his possession concealed from Bowman and which he has made such persistent efforts also to conceal from the court, the contract of March 27, 1882, showing that he and Bowman were not responsible for the costs and expenses of that litigation.

The state of mind in which Bowman was, and from

which came any dilatoriness in payment, and which also made him ready to let go his interest, is thus shown to have been produced by the fraudulent concealment of Patrick. To allow him to use the results of the despondency caused by his fraud, to relieve himself from the consequences of his other concealments, would be to allow him to take advantage of his own wrong.

Patrick's counsel in the court below cited the case of McLure v. Ripley, 2 MacNacnaghten & Gordon, p. 274; it has no application to the facts of this case. The judge deciding that case said (p. 284): "I am quite satisfied that not only was there no willful misrepresentation, but that nothing passed from Mr. Ripley to Mr. McLure to lead him to a conclusion otherwise than perfectly consistent with the information which Mr. Ripley had received." Ripley had not like Patrick concealed an indemnity contract relating to partnership matters, and thereby thrown his partner into a despondent frame of mind; nor did he reach out his hand and close the mouth of a man whom his partner had admitted into such a relation and treated with such generosity as to place him under both a legal and moral obligation to give information to that partner; nor did he write to his partner such a letter as that of September 2d, to deceive and mislead him and prevent him from making inquiry of others.

Bowman was not insolvent and compelled to part with his interest. At times it was inconvenient for him to pay promptly, but there is no evidence that he had not the means to procure money when it was absolutely necessary. He had advanced money for the Patricks and they just before entering into the Col. Sellers matter, were convinced that he had means, as is shown by their effort in the "St. Louis" matter, to get several thousand dollars from him, and "divide afterwards."

But say that Bowman was hard pressed, that is no excuse for his partners concealing the value of the partner-

ship property from him. If he were compelled to let go his interest in the mine, he was entitled to know all that had been discovered, so that he could get the most that could be obtained. Indications that mineral will probably soon be found add a value to mining property. How courts of equity treat partners who are guilty of such concealments, against even an indebted and insolvent partner in a mining operation, when only indications of mineral have been discovered, is shown by the case of *Johnson v. Perens*, 3 Smale & Giffard, p. 419. In that case three partners were sinking a shaft in search of a coal vein. One of the partners was in debt to the other two for his share of expenses, and was insolvent, and the solvent partners were on the point of dissolving the partnership for that reason, when another creditor of the embarrassed partner levied an execution on his interest in the mine. A few days before the execution sale was to take place there appeared in the shaft certain iron-stone, which it seems was an indication that coal would probably soon be discovered. The solvent partners suspended work and concealed the iron-stone from the other partner, and at the sale bought his interest in the mine for less than ~~is~~ its probable value. After the sale they resumed work, sank the shaft a few feet further and discovered the coal vein. The insolvent partner whose interest had been thus obtained afterwards discovered the facts, and applied to the court to have the sale set aside. The court set it aside, saying:

"It is of the utmost importance to see that any right acquired by purchase has been acquired by the solvent partners under circumstances beyond all suspicion. The purchase cannot stand if there appear the slightest speck of unfairness in their conduct in regard to the sale."

Bowman was not compelled by insolvency so sell his interest. He was induced to sell by the concealment of the indemnity contract and the note for $394.85, and the contract of August 16th, and the delivery of the deed in August,

and of the disclosures and discoveries made in the shaft. It was Patrick's duty to give him all the information he himself possessed, so that Bowman could decide whether or not he would sell, and if he sold, at what price.

Where the partner in charge of the business buys the interest of the other, the rule applicable to a purchase by an agent from his principal applies, and that rule is: "In all cases of purchases and bargains respecting property directly and openly made between principals and agents, the utmost good faith is required. The agent must conceal no facts within his knowledge which *might* influence the judgment of his principal as to the *price* or *value;* and if he does the contract will be set aside. The question in all such cases does not turn upon the point whether there is any intention to cheat or not, but upon the obligation from the fiduciary relation of the parties to make a full and frank disclosure."

Story's Eq. Jur. (11th Ed.), Vol. 1, Sec. 316*a*.

"It is clear then in principle that in any dealings with this partner, in the way of purchasing his interest, or of settling the firm accounts, or other transaction touching his entire interest, his position is fiduciary in the same general sense as is that of an agent dealing with his principal. He must show that he has made the fullest disclosure, and that the transaction with his partner was in all respects fair and just."

Bigelow on the Law of Fraud, p. 312.

When the purchasing partner is in charge of the business, and the selling one is absent, the obligation to make the fullest disclosure is particularly strong. In such a case, this court said "all the information in possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold should have been communicated by the former to the latter."

Brooks v. Martin, 2 Wall. 85.

In this case Patrick not only concealed from Bowman by silence numerous and important facts affecting the value, but actively interposed and closed the mouths of others and he himself, wrote to Bowman on September 2d, 1882, a letter designed and tending to prevent inquiry, and to cause him to believe to the contrary of the facts then known to Patrick.

For the reasons given the appellee claims that the decree of the court below is clearly right, and asks that it be affirmed with interest and costs.

E. McGinnis,
Attorney for Appellee.

Opinion of the Circuit Court in Deciding the Case, Delivered Sept. 17th, 1888.

In the Circuit Court of the United States, for the Eastern Division of the Eastern District of Missouri.

Frank J. Bowman, Complainant,
vs.
Wm. F. Patrick and James M. Patrick, Defendants.

OPINION.

Brewer, C. J.: This is an action brought by complainant to set aside a sale of his interest in certain mining property known as the Col. Sellers and Accident Mines, situated near the town of Leadville, in the State of Colorado, and to compel the defendants to account for all moneys received by them as proceeds of the interest so sold.

The case is submitted on pleadings and proofs. The facts undisputed are these: In February, 1882, T. C. Stebbins and others owned the Col. Sellers and Accident mining locations. In that month a contract was made between these owners on one side and the complainant and defendant Wm. F. Patrick on the other, by the terms of which contract complainant and Patrick were to sink a good and substantial shaft down to limestone in place or bed rock, unless pay mineral was sooner found; also to make application for patent title to said mining claims, and in consideration thereof were to receive a deed to an undivided one-half of the property. A deed in pursuance of this contract was executed and placed in escrow. Complainant and his partner, Patrick, entered upon the performance of this contract. The shaft was sunk, mineral was discovered, the deed placed in escrow was delivered and the mine became a very profitable one. On October 19, 1882, complainant conveyed to said defendant, Patrick,

his interest in the property, and this is the sale which is challenged. Complainant and defendant Patrick were partners in this contract, and the first question to be considered is the law which controls in sales by one partner to another.

The rule for the Federal courts is laid down in Brooks v. Martin, 2 Wallace, 70. In this case the court, after noticing the fact that some authorities hold generally that the relation between partners is a fiduciary one, and declining to express an opinion whether that rule is one of universal application, notices these features in that special partnership: First, that one partner was present, and in sole charge and management of the business, while the other was at a distance. Secondly, that this was by arrangement between the partners, and therefore, that the managing partner was really an agent in charge. Under such a state of facts in case of a sale by the managing partner to the other, the court thus states the rule: "We lay down this as applicable to the case before us and to all others of like character, that in order to sustain such a sale, it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and second, that all the information in the possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold should have been communicated by the former to the latter."

The Supreme Court of the State of Missouri, the State in which complainant resided, and the Supreme Court of Colorado, the State in which the defendant lived, and where the property was situated, seemed inclined to go even beyond the Supreme Court of the U. S. in asserting the fiduciary nature of the relations between partners. Pomeroy v. Benton, 57 Missouri; Caldwell v. Davis, Colorado Supreme Court, 15 Pac. Rep. 696. In this case it is conceded that complainant lived in St. Louis and was only

once in Colorado, between February and October; that said defendant Patrick lived in Leadville, and had the active management of the business, and this by arrangement between the partners; so that the case comes squarely under the rule laid down in Brooks v. Martin. That rule must, therefore, be regarded as controlling in this case.

The second question is, when did complainant make the sale to defendant? Unquestionably the conveyance was not made until October 19th; but the defendant insists that a binding contract of sale had been entered into theretofore, and that from the moment it was entered into, the fiduciary obligations arising from the partnership ceased. Fortunately, the negotiations of the partners leading up to the sale were in writing, so that we do not have to depend upon the uncertain memory of witnesses. On June 19, the parties met in St. Louis, the shaft having been sunk a hundred feet or more, and made a settlement. Patrick was indebted to complainant for moneys paid out for him by complainant in some business transactions outside of this, which were allowed in this settlement, and a balance of $288.69 found due from the complainant to the defendant on account of the moneys expended in sinking the shaft. For that sum complainant gave his note, due in three months. Up to this time nothing had been said in reference to a sale. Patrick returned to Colorado, and complainant started to spend the summer in the woods in the northern part of Wisconsin, his post-office address being Bayfield, Wis.

On the 22d of June, Patrick wrote from Colorado to complainant a letter, containing this proposition:

"In regard to your interest in the Col. Sellers, I think I know a man who will pay the note you gave me, $288.69, and take your interest off your hands and let me go right ahead with the work, which I would very much like to do. If you are willing to let it go on these terms, which is the same proposition you made me in your office, please telegraph me immediately and I will try to make the arrangement."

On June 27, he wrote another letter containing this language:

"I would like to have an answer in regard to the proposition I made you about the Col. Sellers, to return you your note and forfeit your share in the contract. There is a party here who will take it."

And on June 28 a third letter containing this:

"Please let me know what we are to do in this new complication, and also about the Col. Sellers, as I am anxious to continue work on that property and see what is there."

These letters were forwarded to complainant in Wisconsin; on the 13th of July complainant came out of the woods to Ashland where was a telegraph station, and sent this telegram to Patrick:

"Yours of June 22d received yesterday; proposition accepted; send note."

On July 15, Patrick answered by this telegram:

"Acceptance too late—proposition was dependent on immediate acceptance in St. Louis. See my letter of 5th."

On July 16, from St. Paul, complainant wrote this letter:

"When I came out of the woods I found your letter of June 22 waiting my answer, and I telegraphed you on same day, accepting your proposition to surrender to you all my remaining interest in the property adjoining the A. Y., on you surrendering my note; and on a perusal of your subsequent letters received here at St. Paul to-day, I learn that is your wish; I do not complain of it. My judgment differs from yours as to the course to pursue, and I should not stand in your way, and will not; if you wish any papers signed, send and I will sign them. My address is Bayfield, Wis."

According to his testimony he had received the letter of 22d June, at Ashland, and letters of the 27th and 28th, after reaching St. Paul. On August 2d, defendant wrote complainant this letter:

LEADVILLE, COLO., August 2, 1882.

Mr. F. J. Bowman:

DEAR SIR.—Yours of the 16th ult., received; in accordance with your request therein I send the within paper for your signature. I sold the note in St. Louis before getting your reply, so will have to wait until it matures, which will be September 19."

The paper inclosed in the letters of August 2d, is in full, as follows:

Memoranda of agreement, made and entered into this———— day of————A. D. 1882, by and between Frank J. Bowman, of the City of St. Louis, State of Missouri, and William F. Patrick, of the City of Leadville, State of Colorado, Witnesseth: That whereas, said above named parties did, on the 17th day of February, A. D. 1882, enter into a certain contract in writing with Theodore C. Stebbins, Lyman Robinson, Samuel J. Glover and Harvey Howard, by the terms of which written contract the said Bowman and Patrick, in consideration of the conveyance to them by said Stebbins and others above named, of the undivided one-half right, title and interest in and to the "Col. Sellers lode" and the Accident lode mining claims, agreed to sink a shaft upon one of said mining claims to pay mineral or limestone in place; and whereas, considerable work and development has been done and performed on said Col. Sellers lode, and the expense thereof has been borne principally by said Patrick, and said Bowman is unwilling to continue said work or pay any of the costs thereof; and, whereas, on the 19th day of June, 1882, said Bowman executed and delivered to said Patrick his certain promissory note of that date for the sum of two hundred and eighty-eight dollars and seventy cents, due 90 days after date, and bearing interest at the rate of eight per cent. per annum, which note was for said Bowman's proportionate share of the cost and expenses of working said Col. Sellers lode, and which had theretofore been paid by said Patrick; and whereas, said Patrick has negotiated and sold said note.

Now, therefore, it is hereby agreed by the parties hereto, that if said Patrick will pay said note when the same becomes due, and save the said Bowman from the payment of the same or any portion thereof, the said Bowman will release and surrender to said Patrick all his right, title and interest in and to the above described contract so made with said Stebbins and others to the property described therein.

The said Bowman further agrees that on the payment of said note and the surrender of the same to him, to execute and deliver to said Patrick a good and sufficient deed of conveyance of his right, title and interest in and to the mining property described in said contract, and known as the "Col. Sellers" and 'Accident' lode mining claims situated in California Mining District, Lake County, Colorado, and the said Patrick agrees on his part to, upon such conveyance to him, to release said Bowman from any and all liability under said contract so made with said Stebbens *et al.*, and to save said Bowman from all such liability.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

(Seal)

W. F. PATRICK. (Seal)

Witness as to Patarick: E. E. Reynolds.

In reply, and on August 28, complainant sent this letter:

CAMP NEAR BRULE RIVER, Aug. 28, 1882.

MR. WM. F. PATRICK—*My Dear Sir:*—I send you the contract you desire, and trust this will settle all our matters pleasantly and amicably. I have inserted a clause concerning your brother's interest, but he may not care to return it. My address will be St. Paul until September 10, then I shall return to St. Louis and business.

Yours truly, FRANK J. BOWMAN.

P. S. Mails are slow here.

"Memorandum of agreement made and entered into this———— day of————————. A. D. 1882, by and between Frank J. Bowman, of the City of St. Louis, State of Missouri, and Wm. F. Patrick, of the City of Leadville, State of Colorado, witnesseth: That, whereas, said above named parties did, on the 17th day of February, A. D. 1882, enter into a certain contract in writing with Theodore C. Stebbins, Lyman Robison, Samuel J. Glover and Harvey Howard, by the terms of which written contract the said Bowman & Patrick, in consideration of the conveyance to them by said Stebbins and others above named, of the undivided one-half right, title and interest in and to the Col. Sellers lode and the Accident lode mining claims to pay mineral or limestone in place; and, whereas, considerable work and development has been done and performed on said Col. Sellers lode, and the expense thereof has been borne principally by said Patrick, and said Bowman has been and is unwilling to continue said work in such manner as said Patrick desires, or to pay any of the cost thereof if continued in such manner as said Patrick desires, or to pay any of the cost thereof if continued in such manner as said Patrick has directed; and, whereas, on the 19th day of June, 1882, said Bowman executed and delivered to said Patrick his certain promissory note of that date for the sum of two-hundred and eighty-eight dollars and seventy cents, due ninety days after date, and bearing interest at the rate of eight per cent. per annum, which note was for the full amount of said Bowman's proportionate share of the costs and expenses of working said Col. Sellers lode, which then remained due and unpaid, all previous amounts having been fully paid by, him and, whereas, said Patrick has negotiated and sold said note.

Now, therefore, it is hereby agreed by the parties hereto, that said Patrick will pay said note when the same becomes due and payable, and save the said Bowman from the payment of same or any portion thereof; and in consideration thereof the said Bowman will release and surrender to said Patrick all his remaining interest in and to the above described contract, so made with said Stebbins and others, and to the property described therein (reserving and excepting, for the use of the brother of said Patrick, a one-sixth interest in said contract, if he shall elect to pay his assessments thereon.)

The said Bowman further agrees that, on the payment of said note and the surrender of the same to him, to execute and deliver to said Patrick a good and sufficient deed of conveyance of his right, title and

interest in and to the mining property described in said contract, and known as the Col. Sellers and Accident lodes mining claims situated in ——— California Mining District, Lake County, Colorado; and the said Patrick agrees, on his part, upon such conveyance to him, to release said Bowman from any and all liability under said contract so made with said Stebbins, *et al.* and to save said Bowman from any and all liability.

Witness our hands and seals, this 28th day of August, 1882.

FRANK J. BOWMAN.

These letters and telegrams are produced in evidence, their sending and receipt admitted. Beyond that defendant claims that on July 5, he wrote to complainant at St. Paul a letter, of which this is a copy:

LEADVILLE, July 5, 1882.

Mr. Frank J. Bowman, Merchants' Hotel, St. Paul, Minn.

DEAR SIR:—I send you a statement of all amounts paid on the Col. Sellers contract since our settlement, from which you will see that the amount due from you thereon is $952.32, for which amount I will draw on you to-morrow. I wish to notify you and hereby do so, that if the draft is not paid, that I will apply to Stebbins and Robison and their partners for a new contract in my own name. I have consulted an attorney here, and am satisfied that we are obliged to continue the work in order to comply with our contract, and that your plan of doing a little work every 10 days would not be acting according to its letter or spirit, and would cause a forfeiture of the contract and the loss of the amount we have spent in sinking the first 100 feet. The same attorney also tells me that under our contract, if you do not pay your proportion when called upon, you forfeit your right under said contract. I want to deal fairly with you, and will tell you that in my opinion, the shaft, which is now 165 feet deep, is looking very promising and I think we are not very far from the contact. My reasons for thinking so are that porphyry is now heavily iron-stained. Hope that you will pay the draft, and that we may continue the work together, but if you do not, I will have to protect myself, and will do so by taking the new contract as I have said.

I withdraw my offer to return your note for $288 70, dated June 19, 1882, in case you assign your interest in the contract to me.

Yours truly, W. F. PATRICK.

And at the same time he drew a draft for the amount named in the letter upon complainant at the Merchants' Hotel at St. Paul. This draft was not paid, and according to complainant's testimony was never presented to him,

and it was sent by defendant endorsed "without protest." This letter was not offered in evidence, and whether any such letter was received by complainant, and whether the copy offered is a correct copy of the letter sent, are both matters of dispute.

There confessedly were no other communications, written or oral, save one to be hereafter noticed between the parties until they met on October 19, in St. Louis, when the deed was executed. Now, upon these facts it is clear that no binding contract was entered into between the parties until that time. The letters in June from defendant contain no proposition of his own, but simply communicate the proposition of another party; while on July 13, complainant telegraphed accepting, yet according to defendant's testimony, and he cannot now be heard to deny it, he had eight days before withdrawn the proposition, and two days after the telegram of July 13, he notifies complainant that his acceptance was too late. Of course he cannot now say that any contract was created by these communications. He himself had never made a proposition, and the party for whom he assumed to act had withdrawn his offer. While it is true, that on July 16, complainant by his letter indicated a willingness to sell upon the same terms, yet the letter and agreement sent by defendant on August 2, was no acceptance of complainant's proposition. The agreement, as prepared, did not purport to bind defendant, but only to bind complainant. It was an attempt on the part of defendant to obtain an option on the property. The contract provides that if the defendant shall pay the note of complainant, which had been theretofore negotiated by defendant, and which did not become due until September 19, then complainant should deed, but no binding obligation is assumed by defendant. If he should fail to pay the note the contract would become nugatory. Complainant evidently unwilling to sign a contract which bound only one of the parties, on

August 28 prepared a new contract, binding both parties which he himself signed and forwarded. Defendant never signed or accepted this; for although he now testifies that he considered the matter closed, yet no such unexpressed intention completes a contract. Up to October 19, nothing had been done by which either party was bound. Complainant might have withdrawn the proposed agreement of August 28, and insisted upon retaining his share in the property because his proposition had not been accepted; and defendant could have compelled complainant to pay his share of the expenses thus far incurred, because nothing had been done to release complainant from his obligations. As I said before, unexpressed intentions to accept constitute no acceptance. It would be strange indeed if a party could avoid the obligations which spring from such confidential relations by saying that he intended to terminate them; for he was in a position, not bound by anything that had been done or said, to decline accepting if before the 19th of October, the absolute worthlessness of the mine had been disclosed. Until defendant had bound himself to purchase, complainant had the right to rely upon him for full information, and the obligation of full disclosure remained until there was some binding contract between the parties. It is not plaintiff's offer to sell, but defendant's offer to buy which cancels the obligations. While the relation of partners continues, their duties and obligations remain. But defendant insists that the obligation of partners are mutual, and his obligation to disclose fully was released by complainant's failure to pay his share of the expenses, and the case of McLure v. Ripley, 2 Macnaghten, 274, is cited. Conceding the full authority of that case I think it is not in point. On June 19, the parties had settled, and complainant had made satisfactory arrangements for his share. He never received the draft of July 5th. The circumstances under which it was sent indicate that payment was not expected, and it was sent

simply for the purpose of crowding complainant out and getting a new contract in defendant's separate name. For in addition to what appears in the letter of July 5, there is also a letter of the same date written by defendant to his brother, in which this language is found:

"The shaft in the Col. Sellers is looking very promising; for several feet the prophyry has been heavily iron-stained, and I have good reasons for thinking we are near the contact. Acting on Col. Bissell's advice, I to-day wrote to Bowman telling him that if he did not pay up, I would apply to the owners of the ground for a new contract in my own name, and leave him out. I don't suppose he will pay, but I will let you into the new one on the same terms you are in the old."

Obviously defendant was then intending to get rid of his partner; and resorted to this strategy of sending a draft to one whom he knew to be absent on a hunting expedition, from which he could not at the time reasonably and did not in fact expect payment and whom possibly he thought the draft would not reach. Such strategy does not commend itself to the conscience of a Chancellor, and does not relieve the party from the pressure of fiduciary obligations.

The third question is this: Did defendant prior to his purchase disclose all the information in his possession which was necessary to enable complainant to form a sound judgment of the value of what he sold? In respect to this matter also the testimony speaks with no uncertain sound. On the 31st of August a large body of ore was discovered. This was before defendant left Leadville and before he had received the contract of August 28th. He seems to have left immediately thereafter in search of complainant. It is true there was quite a flow of water at the same time which prevented further work in the mine, but of the discovery of the ore and that it was a large body of ore, there can be no doubt, nor that the defendant was fully aware of it. As to the exact nature of the discoveries prior to that in the mine, the testimony is not alto-

gether clear. There is testimony tending to show that about the middle of August a vein of mineral was discovered, and on August 16 a contract was signed by defendant and the original owners of the mine, in which it is recited that "a lode or vein is now by all believed to have been struck," and which provided for the delivery of the deed therefore placed in escrow as soon as the shaft should have been sunk to the depth of 250 feet, ten feet below the depth then reached. In fact, the shaft was sunk to 265 feet and the deed delivered by August 31, so that long prior to the conveyance from complainant to defendant, prior to the time he received from complainant the contract of August 28, the parties in Colorado had transferred the title, recognized full performance of the contract, and in fact it had been performed and mineral discovered. None of these facts were communicated to complainant. On the contrary, on September 2 defendant reached St. Louis, and not finding complainant, sent him this letter, the obvious intimation of which was against the completion of the contract, receipt of the deed or the discovery of mineral:

"I reached here this morning and hoped to find you. I sent you from Leadville an agreement concerning the Col. Sellers, in which I agreed to pay that note, $288.70, and you relinquished all rights under the agreement. The shaft is still going down. The note will be due about September 19, so please sign the agreement if you have not already done so, and send to me as soon as possible, so that I may arrange to take up the note. My address for two or three weeks will be Knoxville, Tenn."

Beyond that in the early part of August, indications of nearness of mineral were disclosed, and defendant admits that during that month he cautioned his relatives not to disclose the information he had furnished them concerning the mine, for fear it might reach the complainant. As indicating the dates of these communications to his relatives and as tending to show the nature of the communications he made to them, a letter of August 17, 1882,

written by his mother to her son, and one of August 24th, written by his father to his son, were offered in evidence. They contain these statements:

"On last Tuesday Eddie and self went to K. to bring out Mrs. Dickinson. We stopped to see Annie, of course. Found Mrs. Hale feeling better, but very week. Annie was jubilant over a letter received the other day from Willie. He wrote her that they had found mineral in the Sellers (but conservative as ever), thought it was only a small pocket in the porphyry. While we were there the evening mail brought another letter from W., which E. carried over to A. in order that we might have the very latest news before going home. In this letter he said that a clearly defined mineral vein extended entirely across the shaft, and he was more than pleased with the outlook of the mine."

"Annie was up to see us on Tuesday; she just got a letter from Will; he write her the mine is all right. He is now going through a body of mineral that pays, and hopes to strike carbonates soon and has resolved not to sell, but hold on to the mine. You must not write anything to St. Louis about it, as William has not got Bowman's deed yet, only has a written promise for it. If you have written to any person, caution them to say nothing about it."

Again, shortly after October 19, the time he received his deed from complainant, although the flow of water since the last of August had been such as to prevent further developments of the mine, his brother made a bet that within a year the Patricks would take from their interest in the mine more than $8,000, from sales of ore, and wrote to the defendant in respect to the bet, who on October 29, replied that he had refused $3,000 for a one-sixteenth interest, and that there was no question but that if they could get the water under control he could take out $8,000 or $80,000 within the year.

I lay out of consideration the testimony as given by complainant as to statements made to him on October 19 by James Patrick, for the reason that such statements are denied by James Patrick, and the testimony of complainant is not altogether satisfactory. Putting this one side and resting solely upon that which is disclosed by the letters and contracts and the undisputed testimony of parties

in no way interested, there can be no doubt that many, many facts affecting the value of the property were known to defendant long before his purchase from complainant, and some time before he received the contract of August 28, which he did not disclose to complainant. The case comes clearly within the rule of Brooks v. Martin, *supra*.

But it is further insisted by defendant that the claim is stale, that these transactions were in 1882, while this suit was not commenced until 1886; that in 1883 it became generally known that large bodies of ore were being taken out of the mine, and therefore complainant should have commenced this action earlier. It is enough to say in reply that there is not a syllable of testimony tending to show that complainant knew of the fraud practiced upon him until just before the commencement of this suit, and then only through some family trouble of the Patricks, in consequence of which certain letters were brought to his knowledge. He, himself, positively testifies that he had no suspicion of anything wrong. I do not understand that the mere fact that property which has been sold for a small sum, a few months thereafter is found to be of exceeding value, creates any suspicion of bad faith on the part of the purchaser or casts any duty upon the seller to institute immediate inquiries to see if he has not been defrauded; on the contrary he who acts in good faith generally presumes that the party with whom he has been dealing has acted in like good faith, and may safely rest upon that presumption until facts are called to his attention which indicate the contrary.

I think this is about all I need to say. My conclusions rest but slightly upon the testimony of the complainant, but are reached almost entirely from the testimony of defendant, and those written matters of letter and contract which suffer nothing from failure of memory, but speak with the same language so long as they endure. My conclusion is, that the sale made in October, 1882, cannot be

149 U.S. 411

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Case No. 13,742. Term No. 157.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1892.

WM. F. PATRICK, Appellant,

v.

F. J. BOWMAN, to the use of D. P. Slattery, Appellee.

Supplemental Brief for Appellee.

E. McGINNIS,
Attorney for Appellee.

WASHINGTON:
GIBSON BROS., PRINTERS.
1893.

IN THE

Supreme Court of the United States.

WM. F. PATRICK, APPELLANT,

v.

F. J. BOWMAN, TO THE USE OF D. P. SLATTERY, APPELLEE.

The brief for appellant having been filed but a short time prior to the calling of this case for hearing, and after the brief for appellee had been filed, counsel for appellee makes this response to certain matters in appellant's brief, all other points being fully met in the brief for appellee first filed.

I.

Appellant's brief (p. 30) claims that a contract between Bowman and Patrick was made when Bowman posted his letter of July 16, 1882, to Patrick. Prior to that date Patrick never made a proposition of his own to Bowman. He merely communicated the proposition of some third party and he withdrew that before July 16th. In Patrick's original answer filed in this case, he alleged that negotiations continued until he accepted Bowman's proposition mailed on August 28th and received sometime afterwards. Subsequently he changed his position, and in an amended answer alleged that Bowman accepted on July 16th Patrick's proposition in his letter of June 22d.

Patrick made no proposition in letter of June 22d. He merely said he thought he could find a third party who would take it.

Appellant's counsel afterwards testified in his client's behalf, stating that he advised his client that his acceptance of the proposition contained in Bowman's letter of July 16th would close the contract (Record, p. 468). He now, in his brief on file here, argues against his own testitimony. All this twisting, turning, and shifting in pleading, testimony, and argument is caused by the effort to find a contract where it is not. In his original answer Patrick admitted as the fact was that the contract was made by his acceptance of Bowman's proposition dated August 28, 1882. This acceptance did not take place until October 19, 1882.

Appellee's brief, 17 *et seq.*, and 45 *et seq.*, where letters and pages of Record are cited.

II.

Appellant's brief in various places cites cases showing that a defrauded party who seeks to rescind must act diligently. That is not denied, but a case appellant's counsel has several times cited (Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587) tells him him when the diligence is to begin. It says (p. 592), "The party is bound to act with reasonable diligence *as soon as the fraud is discovered*, or his right to rescind is gone."

Bowman brought his suit the same day the fraud was discovered by him.

Record, pp. 161, 162.

III.

Appellant's brief, in various places, claims that Bowman was guilty of laches in not discovering the fraud sooner.

It clearly appears from the evidence that there was not the slightest suspicion, nor reason for suspicion, by Bowman that Patrick had defrauded him until the letters written by the Patricks to each other were shown him in October, 1886. He was in confidential relations with them, and on terms of friendship. He was not only in partnership with them in the Col. Sellers mining transaction, but was their attorney at the same time in other transactions. He lived nearly one thousand miles from the property, and was never in the State of Colorado after the early part of May, 1882. Gerhard & Whiting, mentioned in appellant's brief as living in same city (St. Louis) with him, were not only unknown to him until after this suit was brought, but they lived, at the time of these transactions, in Leadville, Colorado. Bowman never knew, until after this suit was brought, that they were owners in the property, for they did not acquire their interests until latter part of July, 1882.

Record, pp. 151, 145, 56, 64.

In a case similar to this, where agents defrauded their principals in purchasing for them real estate, and also, afterwards, in charges for management of the property for them, they did not discover the fraud for several years; and when they brought suit against the agents for the fraud, the defendants pleaded laches. It was evident that the plaintiffs could have discovered the fraud sooner had they questioned the vendors and others, but this Court would not heed such a defence from parties in such fiduciary relations to the defrauded party, and upheld the right of a principal to trust and believe his agent, and of a partner to trust and believe his partner, and after stating that the bill alleged that—

"The real facts in relation to these purchases were not discovered by them (complainants) until March, 1881,"

said:

"In answer to the defences of laches and limitations the complainants contend that the alleged bad faith of defendants was not discovered by them until a short time before the bill was filed, and that they had no *intelligible information* of the excess in charges for care and management until late in June, 1878. Reasonable diligence is, of course, essential to invoking the activity of the court, but what constitutes such diligence depends upon the facts of the particular case. Where a party injured by fraud *is in ignorance of its existence* the *duty to commence proceedings arises only upon discovery,* and mere submission to an injury after the act inflicting it is completed cannot generally, and in the absence of other circumstances, take away a right of action unless such acquiescence continues for the period limited by the statute for the enforcement of such right (De Busche *v.* Alt, 8 Ch. D. 286, 314). We hold that the complainants moved with sufficient promptness upon discovering the fraud, and that although *reposing confidence* in their agents *they may have neglected availing themselves of some source of knowledge* they might have sought, *the defendants cannot be allowed to say that complainants ought to have suspected them* and are chargeable with what they might have found out upon inquiry aroused by such suspicion."

Kilbourn *v.* Sunderland, 130 U. S. 505, 518.

V.

Appellant's brief in several places reiterates the statement that the bill does not make any tender of anything back to Patrick. As Bowman lost $18.50 to Patrick knowingly, and many thousands of dollars more by reason of Patrick's fraudulent concealments, it would seem that it would tax counsel's ingenuity to define what should be

tendered. In answer to a similar objection, it was said: "The true meaning of the rule whose frequency of invocation would seemingly argue a better knowledge of its import, that 'he who seeks equity must do equity,' is simply this: that where a complainant comes before a court of conscience invoking its aid, such aid will not be granted except upon equitable terms. * * * The rule referred to finds its application not in questions of pleading, nor by what the plaintiff offers to do therein, but in the form and frame of the orders and decrees, both interlocutory and final, whereby equitable terms are interposed as a condition precedent to equitable relief granted."

Whelan *v.* Reilley, 61 Mo. 565.
Irwin *v.* Brittain, 1 Hoff. Chy. 353.
Winchester *v.* Paine, 11 Vesey, 194.

Even if there were any force in this and other objections not relating to the merits, the appellant is in no position to raise them here, for no assignment of errors was filed in the court below and incorporated in the record as required by the statute.

VI.

Appellant's brief makes some criticism of the averments of the bill as to discoveries of mineral. The attorneys representing complainant when this suit was brought had not the full knowledge of the dates and details of the fraud disclosed by the testimony since taken, and therefore failed to name some of the variations of the fraud, but these are included in the general scope of the allegations, especially as construed by the answer of appellant, and the testimony has been fully taken upon these matters. In fact a very large part of the testimony introduced by the appel-

lant was upon the matters he now says are not covered by the allegations. The allegations of the bill (Record, p. 2) are broad enough to cover all the evidence taken in this case. The word "value" does not mean "profitable," and includes all kinds and degrees of value, not only intrinsic value, but the speculative value given by the discovery of the indications in July, and the still greater value conferred by the mineral chute discovered on August 13th, which led to the contract of August 16th, and to the delivery of the deed on August 22d, and an absolute ownership in the property. If there were any doubt that this was a proper construction of the averments, that doubt is removed by the construction appellant put upon them when he traversed them in his answer. His language is as follows: "Defendants deny that at the time stated in said complaint, to wit, about August 1, A. D. 1882, said mines had been at the equal expense of said plaintiff and defendant, William F. Patrick, or otherwise so developed as to reveal to said Patrick a large or *any* body of valuable ore or *ore of any kind*, or had been developed in any manner to *fully* or *otherwise* reveal or establish the value of the said mines" (Record, p. 7). On the allegations thus construed by the appellant, the evidence was fully taken as to all the discoveries made in July and August, 1882. There is no question about the discovery of the ore body on August 30th being within the averments. There is nothing whatever in the objection that evidence is not admissible to prove the discovery of the ore body on August 30th, under a general allegation that mineral was discovered "about August 1st." It was not the date of an instrument sued on, and exactness as to date in other matters is not required and is seldom possible.

VII.

Appellant's brief tries to make it appear that Patrick, after the discovery of the ore body on August 30, 1882, had no knowledge, but only opinion and belief as to its value. He wrote back to his brother James, on October 29, 1882, that, although there had been no progress since August 30th, and the ore was still under water, he had refused $3,000 for $\frac{1}{16}$, and there was no question but that with the water under control they could take out on their interest not only $8,000, but $80,000 within a year (pp. 118, 252); that the contract of August 16th had been made; the depth of 250 feet, on which the deed was to be delivered, had been reached; that the deed was delivered about August 22d; that on August 30th the shaft had entered an ore body, were not opinions or beliefs, but facts which his partner was entitled to know, so that he also could refuse offers and indulge in opinions and beliefs as to the future of the property. Patrick concealed all these facts from Bowman, and went at once to St. Louis to see him, and failing to find him, on September 2d, wrote him that "the shaft is still going down."

VIII.

Appellant's brief in several places erroneously states the amount of expenses to be borne by Bowman's share. A correct computation, based on Patrick's figures, will be found in brief for appellee, on pages 52, 53, 54, 55. One cause of error is that appellant's counsel failed to note that after the shaft reached the depth of 250 feet, then under the contract of August 16, 1882, the deed was to be delivered (p. 405). The deed was delivered about August 22, 1882, according to Patrick (p. 380). The consequence

of reaching the depth of 250 feet, and delivery of the deed, was that all the expenses which theretofore were borne by one-half of the mine, now that the contract was completed, were extended over the whole mine, thus reducing the expenses to be thereafter borne by Bowman's share one-half.

IX.

Appellant's brief tries to make it appear that Bowman announced in June, 1882, that he was going away for the summer and would not attend to business of any kind. Bowman merely said that, his health being bad, it was his custom to suspend business during the summer months and go to the woods. He gave the Patricks his address for the summer, so that they could communicate with him as to the business of the mine. Wm. Patrick testifies that Bowman did not say in June, 1882, that he would not transact any business during the summer. "He gave me his post-office address so that I could communicate with him. He told me that his address during the summer would be Bayfield, Wisconsin" (p. 321); and James Patrick testified: "He [Bowman] said that he had given my brother that address [Bayfield] for the purpose of enabling him to communicate with him as to payments when they became due" (p. 420).

X.

Appellant's brief (pp. 25 and 26) tries to make it appear, by a strained inference from a forced construction, that Bowman knew on October 19th that the contract to sink the shaft had been completed, otherwise he would not have made a deed but only an assignment to Patrick. The evident reason for making a deed instead of a mere

assignment was due to the fact that Bowman knew that a deed to him and Patrick had been executed and placed in escrow, and that if Patrick should complete the contract he would receive the deed in which himself and Bowman were named as grantees. To meet that condition of affairs when it should happen Bowman made his deed to Patrick. What Bowman then supposed might thereafter happen had already taken place, for though appellant's brief (p. 46) says the deed was not delivered until November 1st it is plain that the depth of 250 feet required by the contract of August 16th had been reached and the deed delivered about August 22d, and that Patrick was keeping the deed from record and from Bowman's knowledge until he could get Bowman's interest. The facts showing this are cited on p. 49 of appellee's brief.

E. McGINNIS,
Attorney for Appellee.